

Copyright's Empire: Why the Law Matters

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COPYRIGHT’S EMPIRE: WHY THE LAW MATTERS

ALINA NG*

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INTRODUCTION

Two separate and distinct movements have colonized research in the field of intellectual property. The law and economics movement has deepened our understanding of the justification for granting monopoly rights over intellectual property; in more recent years, theories in the movement have been used to support the growth of the commons—the free environment where intellectual property plays little role in generating new creative works and innovation. The second movement is the law and technology movement that has sought to increase understanding of intellectual property through the exploration of how technologies either provide freedoms or impose limitations on how creative works and innovation are created and received by society.

The advent of the information age and the infiltration of the Internet into our homes have allowed the ordinary citizen to participate in the process of creating new literary and artistic works and distributing those works across channels opened by new technologies. Scientific research takes on a completely different meaning as new technologies allow DNA sequences to be analyzed through complex three-dimensional computer generated models.¹ This movement has increased our understanding of the legal dimensions of new technologies and the effect these technologies have on society, whether in real life or online. The impact of these two movements on many fields of law has increased our understanding of the law of intellectual property and its effect on society. One thing is clear from the literature: a balance must be achieved between incentives to produce for the creator of a work and access to information, knowledge, and content by the users.

Applied to copyright law, the combined jurisprudence of law and economics and law and technology provides insight into addressing the balance between private rights and public interest. The main issue facing copyright law—the extent to which public access to creative works may be the underlying rationale for the imposition of limitations upon the reach of copyright law, particularly in an age where access to information and knowledge is facilitated by technology—arises from constitutional intent. As outlined in the U.S. Constitution, authors are to have exclusive rights to their writings to promote the progress of arts.²

1. See Richard Wright, *Computer Graphics as Allegorical Knowledge: Electronic Imagery in the Sciences*, 3 *LEONARDO* (SUPP. ISSUE) 65 (1990).

2. U.S. CONST. art. I, § 8, cls. 1, 8. The U.S. Constitution gives “Congress . . . [the] Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Implicit in this is the notion that the ultimate aim of the grant of monopoly rights is the progress of arts for the greater benefit of society.³ One historical underpinning of the development of copyright law was to encourage learning⁴—this was done by rewarding authors for using their talents to the ultimate benefit of the public.⁵ The grant of the copyright monopoly was the most efficient way to enhance public welfare through the works of authors.⁶

Law and economics jurisprudence does not provide compelling arguments to support the notion that the copyright monopoly is the most efficient way to maximize public welfare by promoting the works of authors. In fact, Justice Stephen Breyer, in his tenure piece at Harvard Law School, entitled *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*,⁷ argues that the economic justification for granting rights to authors to encourage authorship cannot be proven.⁸ However, economic theories

Id.

3. MELVILLE B. NIMMER ET AL., *CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION: INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY* 30 (6th ed. 2000).

The authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities. Implicit in this rationale is the assumption that in the absence of such public benefit the grant of a copyright monopoly to individuals would be unjustified.

Id.

4. The Statute of Anne, the first copyright law, was enacted as “[a]n Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.” Act for the Encouragement of Learning, 1709, 8 Ann., c. 19 (Eng.).

5. Chief Justice Hughes identified the primary purpose for the grant of a copyright monopoly as residing “in the general benefits derived by the public from the labors of authors.” *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). A copyright serves as both “the equivalent given by the public for benefits bestowed by the genius and meditations and skills of individuals, and the incentive to further efforts for the same important objects.” *Id.* at 127–28.

6. The Supreme Court in *Mazer v. Stein* alluded to this point and stated that “[t]he economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

7. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

8. *Id.* at 322. Professor Breyer, as he then was, argued that exclusive rights under copyright only minimally contributed toward increasing the volume of literary production, especially of books. *Id.* at 283–84.

regarding the creation of market externalities, the causes for market failures, and the correction of market inefficiencies provide evidence in support of retaining the copyright system as the means of correcting these market failures and inefficiencies and to encourage authorship.⁹ The theories suggest the need for copyright law to achieve the balance between private rights and public welfare as well as individual rights and collective freedoms in situations where the market for information goods is certainly going to be inefficient.¹⁰ More importantly, these theories identify copyright's role in correcting market inefficiencies.¹¹ The law's expansion in the last three decades has had no adverse effect on public welfare because the expansion of the law has not imposed additional social costs.¹² The social cost from the expansion of these private rights is nonexistent because market structures change as technologies develop, providing society with increased accessibility to creative works.¹³ Copyright laws must expand as technology develops to achieve a fair balance between private rights and public interests.

9. 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, 1610–12 (1982). Professor Wendy Gordon explains that “[e]conomists ordinarily characterize intellectual property law as an effort to cure a form of market failure stemming from the presence of ‘public goods’ characteristics.” *Id.* at 1610. There are two characteristics that define public goods: (1) they are non-rivalrous in that one person’s consumption of the good does not reduce another person’s ability to consume the good, and (2) they are nonexclusive in that it is not possible for any one consumer to exclude others from consuming the good. These characteristics of public goods would cause them to be underproduced if left to the private market because free riding will occur. According to Professor Gordon, copyright law allows a market for intellectual property to function by providing a means to exclude non-purchasers through the special property rights that authors have to sell physical copies of their works while retaining legal control over certain uses of the works. *See id.* at 1610–12.

10. *Id.* at 1612–13. Professor Gordon explains that copyright law allows consensual market transfers to take place through the copyright notice requirement, registration system, criminal sanctions, and statutory damages provisions. *Id.* Consensual markets for copyrighted goods are facilitated in four ways through the law: property rights, lower transaction costs, provision of valuable information, and mechanisms of enforcement.

11. *Id.* at 1626. Professor Gordon argues that fair use is an appropriate judicial response to market failures when consensual bargains cannot effectively occur between the copyright holder and user of the work. *Id.* at 1627–35. The market for literary and artistic works may breakdown through the creation of market barriers as a result of new technologies, the presence of externalities, non-monetary interests, and noncommercial activities as well as anti-dissemination motives to control the flow of information.

12. *See* J. Miles Hanisee, Comment, *An Economic View of Innovation and Property Right Protection in the Expanded Regulatory State*, 21 PEPP. L. REV. 127, 158–59 (1993). Rather, the expansion of the law was necessary to allow technological progression to occur. A system of compensation for the risks involved in developing new technologies should be undertaken by society to ensure continuous technological advancement.

13. Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of*

In recent years, law and technology literature has demonstrated that other factors should be taken into account in making a case for copyright law, and one of these factors is the role technology plays in shifting the balance of control of creative works from authors to users. Users are greatly empowered by digital technologies to reuse and rebuild creative works, and the use of technology may strategically alter how works are created and used. In *Code and Other Laws of Cyberspace*, Professor Lawrence Lessig argues that architecture built into the Internet may provide perfect control over activities that occur online through the use of codes.¹⁴ Codes give authors the opportunity to control the use of their intellectual property independent of copyright law.¹⁵ One example of these codes is a trusted system that provides creators of creative works maximum control over how their works are used when these works are made available online.¹⁶ The use of technology can further restrict society's use of free ideas from common resources. Content on the Internet, for example, can be controlled through the use of technology by copyright owners in such a way that

Intellectual Property Law, 9 VA. J.L. & TECH. 4, 25 (2004).

[N]o matter how revolutionary technological advancements may be, the laws of supply and demand and the theoretical framework of external effects apply to technological change in the same manner they do to any other shift in relative costs caused by exogenous changes. . . . In the context of cyberspace, intellectual property law allows content providers to internalize the commercial strategy between authored works and new technological means of distribution and presentation of information.

Id. According to Professor Depoorter, “[d]igital technologies ‘break through the functional rigidities of print media by providing users with extraction tools . . . to sort and arrange data in ways meaningful to them.’ Modern technology can turn incoherent data into meaningful and valuable information.” *Id.* at 27 (quoting J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 65 (1997)).

14. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 6 (1999). According to Professor Lessig,

[i]n real space we recognize how laws regulate—through constitutions, statutes and other legal codes. In cyberspace we must understand how code regulates—how the software and hardware that make cyberspace what it is *regulate* cyberspace as it is. As William Mitchell puts it, this code is cyberspace’s “law.”

Id.

15. *See id.* at 135.

16. *See id.*

Trusted systems regulate in the same domain where copyright law regulates, but unlike copyright law, they do not guarantee the same public use protection. Trusted systems give the producer maximum control—admittedly at a cheaper cost, thus permitting many more authors to publish. But they give authors more control (either to charge for or limit use) in an area where the law gave less than perfect control.

Id.

creativity and innovation cannot freely occur.¹⁷ Our ability to build and shape our culture may also be affected as technology develops to provide creators with the ability to control how content is used and decide the sort of content that we receive as a society.¹⁸ The capacity that technologies provide to authors of creative works to displace the balance of copyright law and shape how works are used by society evidences that the balance intended to be achieved through copyright law is lost.¹⁹ This Article considers the effect of technology on the accessibility of creative works and suggests that such effects provide many reasons to look to copyright law to provide a balance between private rights and public interests that would not ordinarily exist without such a system.

For purposes of analysis, these theories are applied in the context of a relatable example. In a novel about hobbits, goblins, and fantasy, entitled *The Hobbit*, J.R.R. Tolkien conceived of the idea for a greater work that would draw on the foundation of all his previous works.²⁰ This idea was realized in the creation of Tolkien's greatest work, *The Lord of the Rings*, which was built upon his many smaller works.²¹ The novel's adaptation into three blockbuster films,²² a soundtrack,²³ and a

17. According to Professor Lessig, the Internet makes two things possible. First, through the deployment of proper codes, it is possible "to control the use of copyrighted material much more fully than was possible before the Internet." LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 200 (2001). Second, the concentration of media power is threatened by the availability of new technologies over the Internet that open up new channels for production and distribution of content. *See id.*

18. *See* LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 173 (2004).

In response to a real, if not yet quantified, threat that the technologies of the Internet present to twentieth-century business models for producing and distributing culture, the law and technology are being transformed in a way that will undermine our tradition of free culture. The property right that is copyright is no longer the balanced right that it was, or intended to be.

Id.

19. *Id.* at 172–73.

20. MICHAEL WHITE, *TOLKIEN: A BIOGRAPHY* 147 (2001).

21. *Id.* at 183.

22. *See* Official Lord of the Rings Movie Homepage, <http://www.lordoftherings.net/> (last visited Apr. 20, 2007).

23. *See* The Lord of the Rings: The Complete Recordings, <http://www.lordoftherings-soundtrack.com/> (last visited Apr. 20, 2007). For a complete review and analysis of the soundtrack, see Lord of the Rings Soundtrack Analysis and Review, <http://www.lotrsoundtrack.com/> (last visited Apr. 20, 2007).

video game²⁴ illustrates the entire spectrum of copyright's empire and the balance that must be achieved between private rights and the public interest. More importantly, Tolkien's success demonstrates the economic incentives that drive the production of creative works. Producers of creative works rely on property rights as a surety that their investments in producing works are recovered. Thus, one could conclude the following: law and economic jurisprudence evidences that the social cost of the grant of intellectual property rights to creators is always dependent on the benefit that accrues to society to enjoy the works as new technologies develop. The expansion of rights should be allowed if the impact of the expanded rights on society is marginal. Law and technology jurisprudence has shown that technology can always be used to displace the balance that copyright law seeks to achieve.²⁵ In order "[t]o promote the [p]rogress of [s]cience and useful [a]rts," authors and inventors must be given exclusive rights in "their respective [w]ritings and [d]iscoveries."²⁶ Private rights ordering alone will not achieve the balance between private rights and the public interest. In conclusion, this author argues that copyright's empire—the institution that is intended to encourage authorship to ultimately serve the public interest—must be built upon a firm foundation of law. It is only through law that the proper conditions for authorship can exist for the ultimate benefit of society.

I. LAW AND ECONOMICS ANALYSIS IN COPYRIGHT

The traditional justification for copyright law, based on law and economics reasoning, relies upon the rationale that a temporary monopoly right is necessary to encourage authorship to ultimately benefit society as a whole.²⁷ The grant of a temporary monopoly over literary and artistic works serves a utilitarian purpose to "stimulate production of the widest possible variety of creative goods at the lowest possible price."²⁸ The first copyright statute, enacted in England in 1710 to put an end to the booksellers' monopoly over the book trade,

24. See *The Lord of the Rings Online: Shadows of Angmar*, <http://lotro.turbine.com/> (last visited Apr. 20, 2007).

25. LESSIG, *supra* note 18, at 173.

26. U.S. CONST. art. I, § 8, cl. 8.

27. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127–28 (1932).

28. PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 3 (2001).

displays this early thread of utilitarianism in copyright law.²⁹ The Statute of Anne, enacted as an “[a]ct for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned,” forms the historical basis for most copyright legislation in common law countries.³⁰ The utilitarian basis for copyright protection is also evident in the U.S. Constitution, which grants Congress the authority to enact legislation to afford authors exclusive rights in their works in order to promote the greater good of progress in arts and sciences.³¹ The enactment of the first copyright legislation in the United States in 1790, indeed, reflects this intent to promote general societal development, and outlines the purpose of the enactment as being “for the encouragement of learning by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned.”³²

The development of the law of intellectual property has given scholars and practitioners a reason to further understand and increase scholarship in the field. The law of real property has been used to justify the intellectual property owner’s right to exclude society from using the work without prior permission.³³ The economics behind this right to exclude are effectuated by allowing the creator of a work to recover investments made in producing the work. In this way, creators of intellectual property are allowed to recover the benefits that society receives from the creation of the work by exercising the exclusive rights that the authors have as a result of their intellectual property rights. Professor Edmund Kitch has observed that one oversight that many scholars and commentators make about the right to exclude society from using a protected work in ways that have not been permitted by the right owner is that protection of intellectual property rights may

29. *Id.* at 5–6.

30. Act for the Encouragement of Learning, 1709, 8 Ann., c. 19 (Eng.); see GOLDSTEIN, *supra* note 28, at 3. According to Professor Goldstein, “the ideal copyright legislator will test every proposal to extend copyright against the criterion of utility and will vote for the proposed extension only if it is demonstrably necessary to stimulate the creation of new works.” GOLDSTEIN, *supra* note 28, at 3.

31. GOLDSTEIN, *supra* note 28, at 6 (citing U.S. CONST. art. I, § 8, cl. 8).

32. Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790) (repealed 1831).

33. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 484–95 (2003). In this article, the authors argue that economic justifications for recognizing property rights in public goods apply equally to intellectual property to prevent diminishing value in a work and encourage continued investments in marketing, developing, and renewing works. See generally *id.* Property rights are necessary in intellectual property to prevent the inefficiencies that would occur from overuse of goods that are freely available and accessible to the public.

provide the right owner with an economic monopoly over the work.³⁴ Monopolies over works, however, are separate and distinct from property rights in works.³⁵ A right to exclude others from using the work is not the same as an economic monopoly to control competition in a free market place.³⁶

Professor Kitch is correct to the extent that the use of the term “monopoly” to describe the control an intellectual property right owner has over the work suggests a market for content that has only one producer or seller. For copyrighted works, use of the term monopoly conveys the ability of an individual copyright producer to exclude market competition by the sole fact that the copyright owner becomes the market for the good and is in complete control of the amount of output of content offered for sale to the public.³⁷ However, for content, the market is significantly different because competition may enter a market with a product developed from the idea underlying the original work.³⁸ The markets for literary and artistic works rarely produce monopolies in the economic sense because competitors are free to

34. Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1729 (2000).

35. *Id.*

36. *Id.* at 1734–36.

From an economic point of view, “property” and “monopoly” have almost nothing to do with each other. A seller who owns his wares has property but no monopoly if many other people independently sell similar things in the same market. A seller who can control the price of what he sells, because no one seriously competes with him in the market, has a monopoly but not property if he does not own what he sells.

Id. at 1735 (quoting S. SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 85TH CONG., AN ECONOMIC REVIEW OF THE PATENT SYSTEM 53 (Comm. Print 1958)).

37. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 328 (5th ed. 2001). According to Pindyck and Rubinfeld, “[i]f the monopolist decides to raise the price of the product, it need not worry about competitors who, by charging lower prices, would capture a larger share of the market at the monopolist’s expense. The monopolist *is* the market and completely controls the amount of output offered for sale.” *Id.*

38. The U.S. Copyright Act states that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.” 17 U.S.C. § 102(b) (2000). In *Mazer v. Stein*, for example, the Supreme Court decided that a copyright existed in statuettes but not in the idea of using the statuette as a base for a table lamp. *Mazer v. Stein*, 347 U.S. 201, 218 (1954). In *Baker v. Selden*, the Supreme Court decided that copyright protected an author’s explanation for a bookkeeping method but not the method, itself. *Baker v. Selden*, 101 U.S. 99, 104 (1879). In *Nichols v. Universal Pictures Corp.*, the Court of Appeals for the Second Circuit decided that a copyright in a play did not extend to the underlying ideas and themes of the play. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

create competing products with the same underlying features. A “monopoly” over works of intellectual property is, therefore, more commonly understood to convey control over works or some property rights in the works, themselves—that is, rights that enable owners to define the scope of the rights and prevent society from using the works.

The recognition of property rights in works is granted to exclude others from an overuse of intellectual resources and to internalize market externalities. The most often cited work to support a theory of property in this field is Garrett Hardin’s 1968 paper, entitled *The Tragedy of the Commons*.³⁹ Hardin argues that common pastures are prone to overuse.⁴⁰ Where a village’s common green is available for the feeding of all the village livestock, each additional livestock that is added to the commons creates an additional cost that the entire village bears.⁴¹ If each livestock owner acts only according to his or her own immediate best interests and adds livestock to the commons, an inevitable tragedy occurs as the commons becomes increasingly overgrazed and is no longer able to support livestock.⁴² As a result of this tragedy of the commons, the village faces a disaster.⁴³

The same reasoning has been applied in the context of intellectual property. Information goods are available for all to use and are common to society, but information is prone to overuse. Unless fences are erected, common resources, such as information, will be depleted in precisely the same manner that common pastures are overgrazed.

The tragedy of the commons in an economic sense is the presence of externalities in a given market. Where production and consumption activities are not directly reflected in the market, externalities occur; as a result, the prices of goods do not reflect their actual social value. Accordingly, firms may produce too much or too little, creating market inefficiencies. Property law allows market externalities to be internalized by the producer and allows the costs and benefits of activities to be reflected in the price of goods and transferred to the purchasers.⁴⁴

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

40. *Id.* at 1244.

41. *Id.*

42. *Id.*

43. *Id.*

44. Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 *U. CHI. LEGAL F.* 217, 234. Professor Hardy discusses an argument set forth by Professor Harold Demsetz that property rights arise when “it is a cost-effective way for land users to internalize the costs and benefits of the use of the land.” *Id.* (citing Harold Demsetz, *Toward a Theory of Property*

Professor Mark Lemley argues that rights in intellectual property are being construed as forms of real property rights because real property rhetoric provides a strong case for exclusive rights to protectors of intellectual property.⁴⁵ The rhetoric of real property in intellectual property law emphasizes that private ownership is necessary to prevent market externalities from occurring and allows fences to be built around intellectual property as a solution to the tragedy of the commons.⁴⁶ Relying on Professor Harold Demsetz's work, Professor Lemley suggests that property rights may be used to limit negative externalities arising from transactions in the market; when the costs of these negative externalities become sufficiently high, the costs of introducing property rights into the market are justified.⁴⁷ Professor Lemley goes on to argue that the application of the exclusionary right in real property to intellectual property has led the courts and commentators to argue that free riding—unjustly benefiting from the investment that intellectual property owners make in producing the work or invention—must be wrong and, therefore, must be removed from the system.⁴⁸ Protectors of strong intellectual property rights argue that, when society is allowed to free ride on an invention or work, intellectual property owners will not invest sufficient resources in developing the invention or work because

Rights, 57 AM. ECON. REV. 347, 350 (1967)); see also Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1048–49 (1990). Professor Wendy Gordon applies this reasoning to copyright; she speaks about the incentive to create and identifies copyright law as serving to provide these incentives to create. Gordon, *supra*, at 1048–49. Professor Gordon explains that a creator “is to be encouraged to produce by being given a right to capture a portion of the benefits he creates.” *Id.* at 1048. The law should allow those who contribute to cultural development to find incentives to create and, where the person who contributes most is a “creative copyist,” copyright law should reward that effort “by giving them a copyright in their derivative works.” *Id.* at 1049.

45. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1037–38 (2005).

46. *Id.* at 1032.

47. *Id.* at 1037–38.

In his classic work on the economics of property rights, Harold Demsetz argued that property rights are valuable in a society because they limit the creation of uncompensated externalities. In a world without transaction costs, Demsetz argued, the creation of a clear property right will internalize the costs and benefits of an activity in the owner and permit the sale of that right to others who may value it more. Once transaction costs are taken into account, Demsetz believed that the creation or alteration of property rights could be explained by asking whether the social gains from internalizing an externality exceeded the costs of doing so.

Id. (internal citations omitted).

48. *Id.* at 1032.

they are not allowed to capture the full social benefit of the invention.⁴⁹ The property rights in intellectual property must be strong enough that the social value of the invention or work does not exceed the private value to the creator of intellectual property.⁵⁰

Within the realm of copyright law, Professor Lemley's arguments are particularly applicable. Professor Lemley is correct to suggest that owners of intellectual property rights should not be entitled to capture the full social value of their works because it is impossible to fully internalize positive externalities in the marketplace.⁵¹ Full internalization of externalities is only as necessary as it is to recover the investment made.⁵² The tragedy of the commons does not happen in the realm of copyright⁵³ where the market is one for information goods, a pure public good that is nonexclusive and non-rivalrous.⁵⁴ An intellectual property owner cannot easily exclude others from benefiting from the work, and one person's use of the work does not affect another person's use. And as Professor Lemley outlines, there are also severe costs to the grant of intellectual property rights.⁵⁵

This Article endeavors to build upon the work of Professor Lemley and argues that, for copyright law, it is not only impossible to internalize positive externalities in the market, but it is also harmful to allow for a complete recovery of consumer surplus. Market inefficiencies and market failures should be an expected state of affairs for copyrighted works given that positive externalities are not reflected in the price for copyrighted works.⁵⁶ As the markets for literary and artistic works are

49. *Id.* at 1031.

50. *See id.* at 1039–41.

51. *Id.* at 1046–47, 1061–64.

52. *Id.* at 1049–50.

53. *Id.* at 1050–51.

54. *Id.*

55. *Id.* at 1058–59.

These costs fall into five categories. First, intellectual property rights distort markets away from the competitive norm, and therefore create static inefficiencies in the form of deadweight losses. Second, intellectual property rights interfere with the ability of other creators to work, and therefore create dynamic inefficiencies. Third, the prospect of intellectual property rights encourages rent-seeking behavior that is socially wasteful. Fourth, enforcement of intellectual property rights imposes administrative costs. Finally, overinvestment in research and development is itself distortionary.

Id.

56. Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 *HAMLIN L. REV.* 261, 275–76 (1989) (discussing externalities that accompany public goods). Professor Palmer explains that public goods are non-rivalrous and

in most circumstances inefficient and because the existence of market externalities is a source for market failures,⁵⁷ institutional intervention through copyright law is necessary to correct these inefficiencies and to set conditions where authorship and creativity can occur.

A. Positive Externalities in Markets for Information Goods

In the market for information goods, externalities occur when the production or consumption of literary and artistic works is not directly reflected in the market.⁵⁸ Actions by producers and consumers of such works affect other copyright producers and consumers, but this is not accounted for in market prices.⁵⁹ The presence of positive externalities, where society benefits from the production and consumption of a work,

nonexclusive and “each person has an incentive to ‘free-ride’ off of the contributions toward the purchase of the good made by others.” *Id.* at 275.

Being a public good means that the production of ideal objects entails the creation of external effects. My act of publishing or in some other way revealing an idea, for instance, means that that ideal object is appropriable by any and all who wish to think it. They receive positive externalities from my act.

Id. at 276.

57. Gordon, *supra* note 9, at 1613.

Copyright markets will not, however, always function adequately. Though the copyright law provided a means for excluding nonpurchasers and thus has attempted to cure the public goods problem, and though it has provided mechanisms to facilitate consensual transfers, at times bargaining may be exceedingly expensive or it may be impractical to obtain enforcement against non-purchasers, or other market flaws might preclude achievement of desirable consensual exchanges. In those cases, the market cannot be relied on to mediate public interests in dissemination and private interests in remuneration. In extreme instances, Congress may correct for market distortions by imposing a regulatory solution such as a compulsory licensing scheme.

Id.

58. New technologies, for example, create new opportunities to use copyrighted works, which may not have been anticipated by the author or creator of the work, when the work was first introduced into the market. When novel uses of a work by the public become “widespread and more visible,” it creates “substantial opportunity costs to producers” in that there are external gains to society that were not initially anticipated, which are, therefore, “gains to be internalized.” Depoorter, *supra* note 13, at 35. Litigation and lobbying for an extension of copyright law provides the creator of a copyrighted work with the formalities needed to capture the external social gains. *See id.*

59. Alan L. Durham, *Consumer Modification of Copyrighted Works*, 81 IND. L.J. 851, 853–54 (2006). According to Professor Durham, consumers have certain property rights from the purchase of a work, such as the right to sell, lend, or dispose of the work. *Id.* Consumers also have a greater ability to modify works in their homes undetected, due to the facilitation of new technologies. When consumer rights are involved, other questions of “privacy, individual autonomy, and the privileges of ownership associated with physical property,” beyond an author’s right to be remunerated, become important. *Id.* at 854.

is a given condition of the market for intellectual goods.⁶⁰ The investment made in producing a movie creates private benefits to the movie producer, and, when marketed, the firm can earn a large profit to cover the cost of investment in producing a movie.⁶¹ However, the movie is also available to the public for enjoyment and viewing—benefits that society will enjoy freely in the form of a positive externality.⁶²

For purposes of further analysis, it is instructive to return to the earlier cited example of Tolkien's *The Lord of the Rings*. The English writer, scholar, and philologist J.R.R. Tolkien wrote *The Lord of the Rings* and published his work in 1954 and 1955.⁶³ By 2001, *The Lord of the Rings* had “sold over 52 million copies worldwide and ha[d] been translated into twenty-five different languages.”⁶⁴

60. See Palmer, *supra* note 56, at 275 (explaining that it is neither possible nor efficient for a producer of public goods to exclude non-purchasing consumers). Professor Palmer explains that for “a good for which the marginal cost of exclusion is greater than the marginal cost of provision, it is *inefficient* to expend resources to exclude non-purchasers.” *Id.* at 275.

61. See *United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 417 (1980). Justice Goettel indicates that “[a]ll of the major motion picture producers . . . are engaged in interstate commerce, receive annual rentals for their films in the hundreds of millions of dollars, and derive revenues from pay television of many millions of dollars.” *Id.*

62. The enjoyment that the public receives from seeing movies is a form of positive externality, like the enjoyment of a newly painted house or newly planted flowers. Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 966 (2005).

The value of public goods is realized upon consumption. That is, upon obtaining access to a public good, a person consumes it and accrues benefits (value or utility). The production of public goods has the potential to generate positive externalities. Whether the benefits are external to production depends upon the conditions of access and the degree to which the producer internalizes the value realized by others upon consumption. For example, consider a flower garden. A person who plants flowers in his front yard creates the potential for positive externalities that may be realized by those who walk by and appreciate their beauty. The view of the flowers is non-rival; consumption by one person does not deplete the view or beauty available for others to consume. Consumption depends upon access, however, and the realization of potential externalities depends upon whether the homeowner builds a fence that effectively obstructs the public view. If the homeowner builds an effective fence, then he has restricted access and the potential for positive externalities remain untapped. If, on the other hand, the homeowner does not build such a fence, then people who pass by obtain access to the view, consume it, and realize external benefits.

Id.

63. See WHITE, *supra* note 20, at 196, 199, 262.

64. Biography for J.R.R. Tolkien, <http://www.imdb.com/name/nm0866058/bio> (last visited Apr. 20, 2007).

The measure of the private benefit (D) to Tolkien from the sales of his novel is reflected in the cumulative price of the fifty-two million copies of the novel sold. The novel also created positive externalities in the form of external benefits (EB) not reflected in the price of the novel, including the readers' enjoyment of the adventures of hobbits, wizards, dwarves, and magicians while reading the novel. The social benefit (SB) of the novel is the sum of the private benefit accruing to Tolkien and the external benefit accruing to the readers of the novel: $SB = D + EB$.

From 2001 to 2003, the novel was dramatized into three film parts: *The Fellowship of the Ring* (2001), *The Two Towers* (2002), and *The Return of the King* (2003).⁶⁵ The total cost for producing the trilogy was \$270 million.⁶⁶ The three movies were a huge success, ranking as the eleventh, fifth, and second most successful films of all time, respectively.⁶⁷ The movies made \$2.92 billion at the worldwide box office.⁶⁸

The soundtrack from the movie also met with particular success. The film soundtrack by Canadian composer Howard Shore used a technique called leitmotif,⁶⁹ employing recurring musical themes to bring out the characteristics of the people, places, and culture in the movies.⁷⁰ Radio listeners in the United Kingdom, captivated by the music, voted the soundtrack as the greatest film soundtrack in a poll of 44,000 listeners in 2003.⁷¹ Finally, in addition to movies and music, a massive multiplayer, online game was also developed from the novel.⁷²

In this case, the positive externalities spinning off from the novel are considerable. Ideas that generate the production of derivative works are externalities that are not captured in the price of the novel—consumer surplus is created from the uncompensated positive

65. The Lord of the Rings Film Trilogy, Wikipedia, http://en.wikipedia.org/wiki/The_Lord_of_the_Rings_film_trilogy (last visited Apr. 20, 2007).

66. *Id.*

67. *Id.*

68. *Id.*

69. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 665 (10th ed. 1998); see also Leitmotif, Wikipedia, <http://en.wikipedia.org/wiki/Leitmotif> (last visited Apr. 20, 2007).

70. See Music of The Lord of the Rings Film Trilogy, Wikipedia, http://en.wikipedia.org/wiki/Music_of_The_Lord_of_the_Rings_film_trilogy (last visited Apr. 20, 2007).

71. *Ring Music Is "Best Ever,"* BBC NEWS, Aug. 24, 2003, <http://news.bbc.co.uk/2/low/entertainment/3177815.stm>.

72. EA, Battle for Middle-Earth II, <http://www.ea.com/official/lordoftherings/bfme2/us/home.jsp> (last visited Apr. 20, 2007).

externalities that arise from the production of the novel.⁷³ However, as long as sufficient returns are made to cover the costs of producing the novel together with reasonable profits accruing to the author, it does not matter that society may place more value on the novel than the price paid for it. The externalities—in other words, the additional costs that society will pay in order to enjoy the novel—need not be accounted for or internalized by the author in order for the author to recover the investment made in the novel.⁷⁴ To allow internalization of all the benefits to society from the production of the novel would allow the author to claim a share in the successes of the subsequent movies, music, and online games. In other words, for purposes of this example, allowing full internalization of external benefits would enable Tolkien to claim ownership over the entire spectrum of creative production.

It is correct that allowing the full internalization of externalities will create monopolies, as Professor Lemley points out.⁷⁵ However, allowing the full internalization of externalities will also affect how copyrighted works are created and produced. If the first producer of a creative work is entitled to capture all consumer surpluses, authorship and the generation of derivative works from the first producer will be stifled as the first producer seeks to increase returns on investment in the first work.

B. Information Goods: The Cause of Market Failures

Competitive markets fail for several reasons. In a circumstance in which a producer or supplier of a good has market power, the producer

73. Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 439–40 (2005). Professor Sterk, in discussing copyright externalities, speaks of the external benefits to consumers when copyrighted works are widely disseminated. *Id.*

Intellectual works have the potential to generate network effects. The greater the circulation of a work of art or literature, the more valuable the work becomes in facilitating social and professional discourse. If I were the only person to read a novel or see a movie, I would have no one with whom I could discuss the work. Each additional consumer of the work creates value for me—value external to the demand curve faced by the publisher. The network effect exists (in different manifestations) for all intellectual works. If all students in a law school class are familiar with the work of Locke or Coase, I would be able to explore some issues more effectively than if only a fraction of the students are familiar with those works. If students learn more as a result, the benefit will be felt by their clients—not by the owner of the intellectual works of Locke or Coase.

Id.

74. PINDYCK & RUBINFELD, *supra* note 37, at 592.

75. Lemley, *supra* note 45, at 1047.

or supplier may choose to produce fewer goods at higher prices or receive higher prices for less output.⁷⁶ When this occurs, the market is inefficient because an efficient market requires firms to make the same pricing decisions in output production as consumers make in consumption decisions.⁷⁷ Markets may also fail when consumers do not have accurate or adequate information about market prices or product quality.⁷⁸ Inaccurate or inadequate information may lead to producing too much or too little of a product, leading consumers to make uninformed decisions about the product and prevent some markets from developing.⁷⁹

For the market for information goods, the market fails for two reasons. First, markets may fail because of the presence of externalities where market prices do not reflect the activities of producers and consumers. Second, failure may result because information is essentially a public good, and once it is provided to consumers, it is difficult to prevent others from thereafter consuming.⁸⁰ Markets can, therefore, sometimes undersupply public goods.⁸¹

Externalities contribute toward market failures because benefits, which accrue to other parties, are not captured within the market for the good.⁸² The benefits from the derivative works of Tolkien's novel are not reflected in the market for the novel even though the production of that work gave rise to the production of three films, a soundtrack, and an online game. However, as discussed above, the extension of property

76. PINDYCK & RUBINFELD, *supra* note 37, at 592.

77. *Id.*

78. *Id.*

79. *Id.*

80. Gordon, *supra* note 9, at 1611.

Books . . . exhibit certain public goods characteristics. Once the literary work . . . is made available to the public, the sequence of words or the discovery might be used by countless consumers without exhausting the supply. Any number of persons can simultaneously use the newly invented process or reprint the literature without physically depriving others of use.

Id. Professor Gordon further discusses cases of market failure and states that [w]hen . . . works yield such "external benefits," the market cannot be relied upon as a mechanism for facilitating socially desirable transactions.

In cases of externalities, then, the potential owner may wish to produce socially meritorious new works by using some of the copyright owner's material, yet be unable to purchase permission because the market structure prevents him from being able to capitalize on the benefits to be realized.

Id. at 1630–31.

81. PINDYCK & RUBINFELD, *supra* note 37, at 593.

82. *Id.* at 592–93.

rights to allow for the private internalization of these externalities is not only unnecessary but also harmful to the creative process and authorship of derivative works.

Introducing private property rights to encourage private bargaining between the affected parties has been said to address these externalities by protecting the goods from interference by others.⁸³ To a large extent, the law has addressed the failure of the market for information goods and derivatives.⁸⁴ The derivative right under copyright corrects market failures by providing the right to make derivative works.⁸⁵ The three films, the soundtrack, and online games are derived from Tolkien's work, and the production of these new works would have to have been the subject of private bargaining between Tolkien's estate and the producers of these new works. Private negotiations allow consumer surplus to be captured and internalized to reflect the benefits accruing to society.⁸⁶

Information goods are also public goods that are non-rivalrous and nonexclusive.⁸⁷ As information goods are non-rivalrous and nonexclusive, the marginal cost of providing the good to an additional consumer is negligible and society's consumption of the good cannot be excluded.⁸⁸ This allows externalities and free riding to occur and makes it difficult, if not impossible, for the market to price and provide information goods efficiently.⁸⁹ When a large part of society benefits from the good, private bargaining through rights provided under copyright may not be an effective way to correct failures in the market. In such cases, private ordering of rights may be necessary to ensure that

83. *Id.*

84. *See* Gordon, *supra* note 9, at 1613.

85. Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 321 (2005).

[I]n a world without the derivative right, unauthorized derivative works will tend to be close substitutes for the authorized derivative works. And they will tend to be even closer substitutes for other unauthorized derivative works. Thus, sales of unauthorized derivative works are more likely than sales of original works to come at the expense of other works, and there will be an incentive that nudges authors toward inefficiently high levels of imitation.

Id.

86. *See* Palmer, *supra* note 56, at 291–92 (discussing private contractual and other legal remedies to internalize externalities, such as bailments to retain ownership of a work, performance bonds, and trade association agreements).

87. *See* sources cited *supra* note 44 and accompanying text.

88. PINDYCK & RUBINFELD, *supra* note 37, at 644–45.

89. *Id.* at 644–47.

those who value the goods most would be willing to pay for the good, thereby ensuring that information goods are continuously produced.

In the context of online gaming as applied in *The Lord of the Rings* example, the online community of gamers, which is built on the Internet for massive multiplayer, role-playing games, would likely be willing to pay the value of the game only when there are technologies that allow exclusivity of the gaming community playing the game.⁹⁰ Through technologies that prevent gamers from playing the game without paying for the service through a subscription, game producers will be more likely and willing to provide that service.⁹¹ In fact, Professor Lessig has outlined this very point: the architecture of the Internet can be changed and private ordering of rights through codes will change the interaction among individuals over the Internet.⁹²

Markets for information goods fail because the nature of information goods creates externalities that cannot be fully internalized.⁹³ Through law and private ordering of rights, some market inefficiencies are corrected.⁹⁴ Through law, investments made in producing creative works can be recovered and producers may recover the average costs of production.⁹⁵ Through private ordering of rights facilitated by technologies, producers can ensure that they are able to recover production costs for the good to the extent that the value in the good is captured.⁹⁶ However, the question of where the balance should

90. See Frischmann, *supra* note 62, at 943–44.

91. See Press Release, Mythic Entm't, Mythic Entertainment Embraces Digital Distribution for Dark Age of Camelot (Sept. 30, 2005), available at http://www.mythicentertainment.com/press/dr_digital_dist_sep_30.html.

92. LESSIG, *supra* note 14, at 20–21. In virtual worlds—worlds that are connected through networks like the Internet—communities form online, and each person controls a character in real space and real time. The online world is built by the characters that live in it, called “Avatars.” See *id.* Professor Lessig explains this as follows:

Avatar space is “regulated” though the regulation is special. In Avatar space, regulation comes through *code*. The rules in Avatar space are imposed, not through sanctions, and not by the state, but by the very architecture of the particular space. A law is defined, not through a statute, but through a code that governs the space.

Id. at 20.

93. Gordon, *supra* note 9, at 1631–32.

94. See *id.* The fair use doctrine is an example of the intervention of law when markets fail to provide for consensual transfers.

95. John F. Duffy, Comment, *Intellectual Property Isolationism and the Average Cost Thesis*, 83 TEX. L. REV. 1077, 1077–78 (2005). Professor Duffy explains that “[i]n a market economy with free flow of capital, those who invest resources in intellectual property creation will, on average, always expect to recover their fixed costs of producing their intellectual property—no less and no more.” *Id.*

96. Depoorter, *supra* note 13, at 25. Professor Depoorter, speaking in the context of

be set to ensure that the private right captures the value of the good and does not go beyond capture of product value to wealth transfer from the user to the producer remains unanswered.

C. Correction of Market Failures Through Institutional Intervention

The correction of market failures in the markets for information goods must be made through intellectual property law. For the purposes of literary and artistic works, copyright law provides the institutional intervention to correct the inefficiencies created from consumer surplus that are not internalized by the producer.⁹⁷ The reproduction right—preventing the reproduction of the work—captures the value of a work by limiting uses of the work.⁹⁸ A user who pays a price for the purchase of a novel is not entitled to make copies of the book without the author's permission because the novel price does not include a right to make copies of the work.⁹⁹ A purchaser of a book has the ability to make copies of the book and sell the copies, creating a benefit that is not within the market for the book, itself. Similarly, distributing a novel without the author's permission constitutes an action that is not accounted for in the market price for the novel. Without the recognition of the distribution right of copyright, producers of literary and artistic works will not be able to efficiently price their works while users freely make copies of the works and distribute them. The derivative right, to a large extent, protects the producer of works against chains of markets that develop from the producer's initial

cyberspace, states that "intellectual property law allows content providers to internalize the commercial strategy between authored works and new technological means of distribution and presentation of information." *Id.*

97. *See id.* at 53–56 (discussing collective rights organizations as institutions to coordinate pricing of copyright licenses); Gordon, *supra* note 9, at 1600 (discussing fair use as an institutional correction for market failures in the market for copyrighted works); Sterk, *supra* note 73, at 426 (discussing the need for property rights to play an important role in neoclassical economic theory to correct inefficient markets); *see also* Shubha Ghosh, *Copyright as Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653 (2004) (discussing the function of copyright as a theory of democratic governance to encourage cultural production).

98. Durham, *supra* note 59, at 877 ("The purchaser of a painting, book, compact disc, or DVD does not acquire, automatically, the exclusive right of reproduction, performance, display, or adaptation.").

99. *See* Abramowicz, *supra* note 85, at 326–27. "Copyright's reproduction right provided Margaret Mitchell and her publisher an incentive to 'invest time and money in writing, editing, producing and promoting the popular novel, . . . knowing that no one may copy the work's expressive content without their consent.'" *Id.* (quoting Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 216 (1983)).

market and that create their own positive externalities. When this occurs, the market for information goods cannot efficiently dictate a fair market value for the good because producers are under compensated for the value of the good, thereby causing too little production of the work.¹⁰⁰

Copyright law provides a market solution by affording to producers of literary and artistic works the ability to capture positive externalities to more accurately reflect the value of their works.¹⁰¹ It is impossible, for example, for Tolkien to capture all external benefits from the publication of his work. Tolkien has externalized the benefits from his authorship and is not able to internalize the benefits to reflect the true value of his work. Other producers would be able to create derivative works out of the novel and create new markets with new positive externalities that would undermine the investment in and value of the original work. Where producers of literary and artistic works have property rights over the work, they are able to appropriate some of the profits that others make from using their works. Through the property right, which provides producers of literary and artistic works the ability to recover a profit that reflects the value of their works, competitive markets are better able to adequately support authorship and provide encouragement to producers of literary and artistic works to produce works that the market will sustain.

The grant of a property right to producers of literary and artistic works in the absolute sense, however, will have an adverse effect if producers have the right to determine the value and prices for their works.¹⁰² The distortion of markets can also occur when producers price their products above fair market value; in circumstances where it is difficult to place a value on an intangible product—such as literary and artistic works—there is a risk that producers will overprice their products and seek a return in excess of the marginal cost of

100. Palmer, *supra* note 56, at 275 (stating that goods of a public nature that allow for non-rivalrous consumption and nonexclusivity provide consumers with an incentive to free ride).

101. See Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 61–62 (2001). This may be done through price discrimination in the markets for copyrighted works. The law regulates the relationship between a producer of copyrighted works and competing producers, distributors, and users.

102. See Timothy J. Brennan, *Copyright, Property and the Right to Deny*, 68 CHI.-KENT L. REV. 675, 687 (1993). Professor Brennan explains that “[c]opyright, by allowing a copyright holder to exclude those unwilling to pay the chosen price, will exclude those who are willing to pay a positive price . . . but are not willing to pay the copyright holder’s price.” *Id.*

production.¹⁰³ When this occurs, deadweight losses are created.¹⁰⁴ The result of such deadweight loss is that some consumers will not be willing to pay more than it costs to produce the work.¹⁰⁵ These consumers will either be denied access to the work or may resort to piracy to obtain the work at a price below the market.¹⁰⁶

In a market for derivatives, absolute copyright protection will also affect the derivative markets of the initial work. If a producer of a work is given the right to control uses of ideas and imposes high licensing fees, the ability of new producers to produce new works will be affected.¹⁰⁷ If Tolkien, for example, had the absolute right over *The Lord of the Rings*, no one else would be able to capture any benefit from making derivatives. The producer of the films, Peter Jackson, would not be able to profit from the sale of the films and would not be able to capture any benefit from the movie audiences.

Rent-seeking behavior by producers of works is also an undesired outcome of absolute property rights. Producers of literary and artistic works may spend large amounts of money to acquire or maintain a monopoly position.¹⁰⁸ An example would be to expand the term of

103. See Sterk, *supra* note 73, at 467.

Ordinarily, propertization of resources is extolled for its ability to internalize externalities; if a property owner can capture all external benefits created by the resource, the owner is more likely to use the resource efficiently. When the resource is non-rival, however, complete propertization may result not in the capture of external benefits, but in their dissipation. The owner will typically charge a positive price for the resource even though the marginal cost of distributing another unit is zero, resulting in a deadweight loss. Avoiding this loss serves as a foundation for the doctrinal limitations on copyright protection—durational limits, fair use and first sale among them.

Id.

104. *Id.*

105. Lemley, *supra* note 45, at 1059.

106. *Id.* This would result in “static economic inefficiency that may be great or trivial, depending on the intellectual property right in question.” *Id.*

107. Abramowicz, *supra* note 85, at 361 (stating that derivative rights come with social costs); Durham, *supra* note 59, at 896–900 (discussing consumer modifications of copyrighted works and whether a copyright owner should be legally entitled to prohibit the modification when the purpose of the modification is to make the work more meaningful or appealing to the consumer).

108. Lemley, *supra* note 45, at 1063.

The very process of government granting rights over creations encourages creators to petition Congress to give them still more rights. . . . This rent seeking is a cost of government-granted intellectual property rights. Indeed, economic theory suggests that private parties will spend up to the total value of the benefit seeking to capture it.

Id. at 1063–64.

copyright protection¹⁰⁹ or increase the laws protecting copyrighted works.¹¹⁰ To Professor Lemley, legislative rent-seeking behaviors of this form are a cost of the rights provided by the government.¹¹¹ Enforcement of copyright is also expensive in terms of legal fees as well as time spent by courts, legislators, law enforcement officers and administrative agencies.¹¹² Finally, it is harmful to extend protection beyond the point that is necessary to enable producers of works to recover their investments.

The creation of absolute rights to allow for full control over external benefits from the production of works does not exist with any other form of property.¹¹³ If it were to be allowed in intellectual property, the result might end up being to encourage too much investment in creativity that does not resonate with other forms of production.¹¹⁴

There is a balance that must be struck in order to achieve equilibrium in the market for information goods. Rights must be sufficient in order that producers of literary and artistic works may recover investments made to produce the works and make sufficient profits to have incentives to continue to produce new works. At the same time, it is important to ensure that the public is able to enjoy the benefits of literary and artistic authorship.

Economic theories do not provide an adequate solution.¹¹⁵ The line between the private right to control and the public interest in accessing information goods remains an elusive one.¹¹⁶ Arriving at a single solution that states where the balance should be is an elusive goal given that there are so many variables within economic theories that would affect where the ideal balance should be—such variables include, among

109. In 1998, Congress extended the copyright term by twenty years by passing the Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

110. The Digital Millennium Copyright Act (DMCA) makes it a criminal offence to produce and disseminate technology that would circumvent measures taken to protect copyrighted works. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C). It also increases the penalties for infringing copyrighted works on the Internet. *Id.*

111. Lemley, *supra* note 45, at 1063–64.

112. *See id.*

113. *Id.* at 1069. Professor Lemley suggests that “the economic arguments for property don’t justify the full internalization of social surplus as a general matter, but only in the limited circumstances of the tragedy of the commons. The leap from property right to ‘despotic dominion’ is not a universal one.” *Id.*

114. Professor Lemley takes up a more thorough discussion of the costs of absolute intellectual property. *See id.* at 1058–65.

115. *Id.* at 1065.

116. *Id.*

others, the type of creation, the nature of work, the market structure, the supply and demand of goods, the investment made in production, and the distribution channels.¹¹⁷

Although the proper economic balance cannot be found in economic theories,¹¹⁸ law and technology scholarship has, nevertheless, shown that technology may provide a private solution to drawing the boundaries of private ownership.¹¹⁹ The onus on achieving a fair balance between private rights and public interests resides with the producers of works.¹²⁰ Therefore, the discussion must now turn to identifying how technologies may play a role in providing a balance for determining where copyright should begin and where it should end.

II. TECHNOLOGY AND THE LAW OF COPYRIGHT

The development of new technologies has always affected markets for literary and artistic works.¹²¹ Scholars often refer to the printing press as the technology that gave rise to copyright as a system of rules to regulate printing.¹²² Authors began to realize the economic value of their works as printing presses emerged and this new technology allowed for works to be quickly and cheaply reproduced.¹²³ In delivering

117. Scholarship on intellectual property has used many different points of economic analysis for justification. *See id.* at 1075.

118. *Id.* at 1065–69.

119. *See* Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943, 993 (1998).

120. There is an onus on the producers of creative works to recognize the changing landscape of consumption of literary and artistic works as consumers begin to exert personalized choices about what content to use and how they use content. The architecture of the Internet provides this ability and content producers may be in the best position to ensure that private choices and social values are embodied in the manner they produce and distribute content. Professor Lessig points out that “[w]hat people listen to and what they find compelling are matters of private not public choice.” LESSIG, *supra* note 17, at 263.

121. *See* Brian A. Carlson, Comment, *Balancing the Digital Scales of Copyright Law*, 50 SMU L. REV. 825, 827 (1997) (stating that “[t]he history of copyright law is replete with examples of new technology pushing the outer limits of copyright law, often to the point of forcing copyright law to evolve or risk becoming ineffective at promoting its underlying goal”).

122. WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 4 (1994). According to Patry, “[t]he printing press, with its ability to make multiple copies of a work easily, is frequently cited as the impetus for efforts to secure a more formal type of protection for books.” *Id.*

123. For further information about the effect of the printing press on the early book reproduction trade of the fifteenth century, see Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 MICH. ST. L. REV. 1.

the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*,¹²⁴ Justice Stevens outlined the following:

From its beginning the law of copyright has developed as a response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.¹²⁵

The role of technology is central to the development of copyright law.

Technology provides producers of information goods with the ability to define their property rights over their works.¹²⁶ Technology can either provide or restrict access to works, and it can either strengthen the position of the producer or provide greater freedom to consumers to use the work.¹²⁷ Professor Lessig's work illustrates how technology may be used to define the balance between private control and public access to works; he suggests that responsible use of technologies will lead toward greater freedom of creative expression within a reasonable system of property that continues to encourage authorship.¹²⁸ The information commons—the area that comprises creative ideas and works that are free to the public to use and are crucially important to the development of new works and innovation¹²⁹—must be protected against technological controls that erect private barriers and restrict public access to these building blocks of creativity and innovation.

Technology has also provided greater freedom to society to participate in the creative process. More consumers are able to capture the benefits from the production of creative works into their own works and activities, creating derivatives and market externalities of their

124. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

125. *Id.* at 430–31.

126. The networked economy presents radically different and decentralized production and distribution functions for the market. Professor Benkler explains that “the networked information economy can be more open and admit of many more diverse possibilities for organizing production and consumption than could the physical economy.” Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1247 (2003).

127. There are increased possibilities for peer production and joint creation of works. *See id.* at 1256.

128. *See* LESSIG, *supra* note 14.

129. *See* LESSIG, *supra* note 17, at 49. Professor Lessig defines three aspects of the commons, and defines the third aspect as “the commons of innovation . . . the opportunity, kept open to anyone, to innovate and build upon the platform of the network.” *Id.*

own.¹³⁰ The reproduction, distribution, and derivative rights under copyright become more important to provide a fair market exchange so that producers may capture the fair market value of works and consumers are able to create wealth from the original productions.¹³¹ Several things are clear from the exercise of these rights by the producers of creative works: first, the balance of power between the producer and users will change depending on the technology that is available to either provide control or increase access to works; second, technologies are tools that will assist producers of creative works to grow as markets for information goods change; and third, technology cannot provide the balance between private control and public access to works. Only copyright—as an institution of law—can fill that need.

A. Capturing Social Surplus in Markets for Information Goods

We have moved past the questions of whether rights in literary and artistic works should be protected. The answer to that question is a resounding “yes.” This leads, though, to the question of how these works should be protected.

These works should be protected to the extent that the producer of the work is able to recover the marginal cost of production and also make reasonable profits from the production as an incentive to produce. It is difficult and harmful to attempt to capture and internalize all positive externalities. Some of these externalities will not be accounted for in prices for the goods. However, where copyright law clearly defines property rights over the work, the producer of creative works may internalize some positive externalities from the production of the work.¹³² In competitive markets, this takes place through private bargaining between the producer and consumer of the work.¹³³ The value of the work is reflected in prices set through negotiations. Transaction costs are incurred through the negotiations for permission to use the work at a fair price.

On the Internet, technologies provide control over works that are not possible in real space. An example of a control that would be impossible to enforce in real space is the purchase of a novel. Professor

130. See Depoorter, *supra* note 13, at 27; Frischmann, *supra* note 62, at 1019.

131. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 440–41 (1984).

132. Gordon, *supra* note 44, at 1048–49; Hardy, *supra* note 44, at 234.

133. Gordon, *supra* note 9, at 1612–13 (discussing copyright’s role in facilitating the “consensual market in four ways: it creates property rights, lowers transactions costs, provides valuable information, and contains mechanisms for enforcement”).

Lessig sets forth an example of a police officer being “sold” with each book to ensure that the buyer uses the book in a way consistent with what was agreed upon when the book was sold.¹³⁴ However, the prohibitive costs of attaching a police officer with the sale of a book to monitor uses of the book will not permit differential pricing for different social benefits that arise from the use of the book. For example, a producer may try to price a book at one dollar if the buyer agrees to read the book only once, and he or she will price the book at one hundred dollars if the buyer plans to read the book more than one hundred times.¹³⁵ Technologies, however, permit this form of bundling and differential pricing to capture social surpluses in accordance with the value each user places on the goods.¹³⁶ Media subscription services for information provided over the Internet are a good example of bundling and differential pricing to reflect the user’s value for the good.¹³⁷ As a result of these new technologies that allow producers to define the boundaries of their property rights, prices of information goods may be set according to the value users ascribe to them—users who value the good more will be willing to pay more, thereby reducing deadweight losses in the market place.

The benefit of technologies in the market may be secondary to the harm that will arise when these technologies are used by producers of information in two ways: (1) to draw boundaries around information that rightfully should belong to the commons, and (2) to prevent the development of technology that allows consumers to capture positive externalities and benefits from the market.¹³⁸ In many cases, external benefits are never captured and it would be harmful to society if all producers of information goods were to try to capture and internalize all positive externalities. Professor Lessig provides the example of “copyright bots,” which are computer programs that scan Web pages on the Internet and allow content owners to identify and request sites that

134. LESSIG, *supra* note 14, at 127–30.

135. *See id.* at 128.

136. *See* James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2024–25 (2000) (discussing the technologies that may be used to bundle and price discriminate based on a consumer’s ability and willingness to pay).

137. *See* Meurer, *supra* note 101, at 72. Professor Meurer explains how “[s]ellers measure preferences by observing buyers’ choices.” *Id.*

138. Reverse engineering, for example, is a positive externality in the form of competition by a potential inventor and market entrant. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1057 (1997).

contain potentially infringing materials to be shut down.¹³⁹ For example, EMI requested that an online guitar archive, which hosted a site to allow guitar hobbyists to exchange chord sequences, be shut down because of potential copyright infringement.¹⁴⁰ The difficulties of tracking and internalizing externalities in real space do not apply to the Internet, and the potential for drawing boundaries around market activities that are rightfully public and external to the market for the information goods is substantially increased, thereby extending rights beyond the necessary limits, and the producers of information goods are able to transfer wealth from the public to themselves.

Attempts to capture consumer surplus in the market for information goods also have the potential effect of displacing intermediaries or information carriers, which provide content to users on the Internet. The decision in *A&M Records, Inc. v. Napster, Inc.* did precisely that.¹⁴¹ In *Napster*, an Internet start-up company, which allowed its users to exchange music files, was shut down.¹⁴² The software that Napster developed provided an online community with a service that enabled users to share and exchange files, including MP3s and music files in an audio format, through a central server.¹⁴³ The software created an extensive network that allowed people to enjoy and share their favorite music, not unlike two friends exchanging music that they enjoy.¹⁴⁴ On the Internet, however, this form of market activity was regarded as an activity that the law did not permit.¹⁴⁵ Record companies were allowed to internalize positive externalities from potential markets—markets that the recording companies had not yet captured. Evidence that there was a substantial likelihood that Napster would adversely affect the potential market for copyrighted works was accepted by Judge Patel based on a claim that three general types of harm would occur if the Napster software were to be allowed: “a decrease in retail sales, especially among college students; an obstacle to the . . . plaintiff’s future entry into the digital downloading market; and a social devaluing of music stemming from its free distribution.”¹⁴⁶ Recording companies

139. LESSIG, *supra* note 17, at 180–83.

140. *Id.* at 182–83.

141. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff’d*, 239 F.3d 1004 (9th Cir. 2001).

142. See *id.*

143. *Id.* at 906.

144. *Id.* at 905–08.

145. *Id.* at 927.

146. *Id.* at 914.

may suffer these effects, but this does not justify the expansion of property rights.

Consumer surplus should only be captured within existing markets, and rights should not be expanded to markets that do not yet exist or which the information good producer has not yet entered. Rights must be exercised within existing markets and within existing boundaries that clearly define property rights. In *Sony*,¹⁴⁷ the Supreme Court dealt with a novel and new technology—the videocassette recorder (VCR)—by considering largely the general societal benefits, which the new technology brought.¹⁴⁸ The Court regarded these benefits as far outweighing the more nebulous claim by the copyright owner that the use of the VCR crossed “invisible boundaries” of control that copyright owners have over their programs.¹⁴⁹ Regarding the use of the VCR for home time-shifting purposes to be a fair use of a copyright owner’s content, the Supreme Court emphasized the requirement that the copyright owner demonstrate some likelihood of harm before a private act of time-shifting is to be condemned as a violation of federal law.¹⁵⁰ Justice Stevens, however, in delivering the majority opinion of the Court, recognized that this may be a right that Congress did not intend for the copyright owners.¹⁵¹ It was not the job of the courts, Justice Stevens reasoned, to apply laws that had not been written.¹⁵² In other words, providers of information goods must only capture consumer surplus within existing markets.

147. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

148. *Id.* at 454.

149. *See id.* at 456. While nuances in perceptions and points of philosophy are understandable, the district court did not think there was justification for an injunction against the use of the VCR. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 467 (C.D. Cal. 1979), *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984). The district court determined that harm from time-shifting was speculative and minimal. *Id.*

150. *Sony*, 464 U.S. at 454.

151. *Id.* at 456.

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

Id.

152. *See id.*

B. Correction of Market Failures Through Technologies

Markets for information goods will always fail precisely because of externalities that prevent adequate expression of benefits to society in price and economic decision making by producers of information goods. Recognizing private property rights in information goods is one way to encourage private producers to fund the production of these goods—goods that are essentially nonexclusive and non-rivalrous.¹⁵³ Technologies have a significant role in correcting these failures and improving efficiencies in the market. One of the most significant technological developments is the Internet, where the potential to connect authors to their audience is unlimited. The inefficiency of markets for information goods can be corrected when technologies are used to ensure that producers of information goods work under proper conditions to encourage authorship and society has access to works that are essential toward social development and growth. Through the proper balance between private property and the public interest, information goods may be efficiently produced and allocated in the market.

The economics of creative production has always been dependent on the technologies that allowed cheaper copies of a literary and artistic work to be made and distributed to a far wider audience. The more copies made and the more people to whom the work is distributed, the greater the revenue for the producer.¹⁵⁴ Just as the printing press long ago altered the economics of information goods production, the Internet has altered the economics for information goods production of this age. Unlike prior technologies, the Internet now provides the ability for producers of information goods to privately order their rights to maximize revenue from the public. Media subscription services allow information to be bundled, packaged, and suited to the consumer's preferences. As many as one million consumers subscribe to online gaming services to be part of a virtual community.¹⁵⁵ Individual tracks of music may be downloaded or streamed from an online music provider, and the purchase of films has also become possible through the Internet. The media information distributor, motion picture companies, and

153. Gordon, *supra* note 44, at 1048–49; Hardy, *supra* note 44, at 234; Palmer, *supra* note 56, at 275–76.

154. See Depoorter, *supra* note 13, at 35–36.

155. The combined global membership of subscription and non-subscription games exceeds fifteen million. See Massively Multiplayer Online Role-Playing Game (MMORPG), Wikipedia, <http://en.wikipedia.org/wiki/MMORPG> (last visited Apr. 20, 2007).

sound recording companies have been displaced, and authors, themselves, are now directly connected to the consumers of their literary and artistic works.

Professor Paul Goldstein portended the changes that copyright markets would face with the Internet twelve years ago.¹⁵⁶ He wrote about a “celestial jukebox,” a metaphor for the technological possibilities for copyright markets in the future.¹⁵⁷ The celestial jukebox is a “technology-packed satellite orbiting thousands of miles above Earth, awaiting a subscriber’s order”¹⁵⁸ to connect the subscriber to a storehouse of information and content that the subscriber will pay for and receive.¹⁵⁹ When this metaphor was first conceived, its infrastructure was a figment of imagination, but today, the Internet has brought the celestial jukebox metaphor to life.

Professor Goldstein’s foresight of the changes technology would bring to the market for information goods has proved quite accurate. First, Professor Goldstein suggested that “the celestial jukebox may reduce transaction costs of negotiating licenses . . . for complete works . . . [and] for small fragments as well.”¹⁶⁰ He foresaw the emergence of technologies to enable copyright owners to charge users differently in accordance to the value of each element of a work that is used.¹⁶¹ The capacity of the celestial jukebox to charge subscribers for access and to shut a service off if the subscriber fails to pay the bills¹⁶² is evident in the current practices of music streaming subscription services and online music catalogues like Rhapsody, among others.¹⁶³ Second, Professor Goldstein foresaw the greater role authors would play in the market for literary and artistic works and the lessening role that book publishers and motion picture and record producers would have in the market.¹⁶⁴ Today, this may be seen in the rise of the many independent musicians and composers who have made their music available to the

156. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 199 (1994).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 223–24.

161. *See id.*

162. *See id.* at 224.

163. *See, e.g.,* Welcome on Rhapsody, <http://www.rhapsody.com/welcome> (last visited Apr. 20, 2007).

164. GOLDSTEIN, *supra* note 156, at 234–35.

public through online independent music communities with free hosting of independent music, such as GarageBand.com.¹⁶⁵

The reduction of transaction costs as license negotiations become more efficient between producers of information goods and users, as well as the displacement of the distributor of content by Internet technologies and networks, contribute toward correcting market inefficiencies for literary and artistic works. New technologies, especially the connectivity facilitated by networks on the Internet, have contributed to a more efficient market for literary and artistic works.¹⁶⁶ However, it is also important to note that the celestial jukebox will not entirely replace traditional copyright markets. In traditional copyright markets, the law is the primary institution to provide an efficient outcome between private rights and the public interest.

C. Copyright as an Institution for Balancing Private Control and Public Access

The balance between private control and public access is important in copyright law because the underlying purpose for the grant of property rights in literary and artistic works is to promote education and learning within society from the availability of literary and artistic works.¹⁶⁷ Harkening back to the origins of copyright law, the Statute of Anne was intended to impose the burden of literary and artistic production upon booksellers in order to meet the public interest for learning.¹⁶⁸ Within today's copyright framework, the property rights granted by the law cannot be absolute in the sense that producers may impose prices that go beyond the fair value that consumers would be willing to pay. Some externalities in the market will have to remain external to the market and cannot be internalized.¹⁶⁹ In *Donaldson v.*

165. GarageBand.com, <http://www.garageband.com> (last visited Apr. 20, 2007).

166. See Burk, *supra* note 119, at 948.

167. See Act for the Encouragement of Learning, 1709, 8 Ann., c. 19 (Eng.).

168. See Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 409 (2004).

[T]he Statute of Anne . . . had as its foremost objective, the encouragement of learning—a general public interest—not the private economic interests of authors, printers or publishers. It did have a secondary interest for the economic security of authors and other proprietors of books and writings, but this secondary concern was driven by the impact that the void of regulation had upon the creation of “useful books.”

Id.

169. See Frischmann, *supra* note 62, at 988–89.

Beckett, decided by the House of Lords,¹⁷⁰ Lord Camden made a similar observation, mentioning that producers cannot maintain monopolistic prices over literary and artistic works; if that were to occur, then “[a]ll our learning will be locked upon in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are.”¹⁷¹

Two aspects of copyright law are particularly important in balancing private rights and the public interest. The first—the fair use doctrine—is codified in § 107 of the U.S. Copyright Act.¹⁷² The doctrine outlined in § 107 provides guidelines to assist courts in determining fair use,¹⁷³ and courts have regarded the four factors outlined therein as being equally important in undertaking an analysis of fair use.¹⁷⁴ According to Professor Wendy Gordon, fair use is employed to “permit uncompensated transfers that are socially desirable but not capable of effectuation through the market.”¹⁷⁵ When markets do not function effectively to allocate resources among individuals—as is the case, for example, when “the markets fail to generate economically desirable outcomes when using the market process would threaten other social goals”—other modes of resource control will be employed by the legal, economic, or social system to reallocate resources.¹⁷⁶ The fair use doctrine, which is the “judicial response to market failure in the copyright context,”¹⁷⁷ serves to allocate resources between the copyright owner and users when it is otherwise impossible for users to obtain authorization from copyright owners for the use of the work.

170. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.). *Donaldson v. Beckett* established the precedent that the Statute of Anne prevailed over common law property rights. *Id.* Rights and remedies attached to a work were to be determined under statutory provisions. See PATRY, *supra* note 122, at 13–14; see also LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 175 (1968).

171. *Donaldson*, 1 Eng. Rep. 837; L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 42 (1991).

172. 17 U.S.C. § 107 (2000).

173. *Id.* Factors to be considered in determining fair use are the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.

174. *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 21 (1992).

175. Gordon, *supra* note 9, at 1601.

176. See *id.* at 1605.

177. See *id.*

Fair use, however, may have very little application for activities taking place on the online market for information goods.¹⁷⁸ Precisely because direct contact is possible between users and producers of information goods, transaction costs to obtain permission for use is substantially reduced and, hence, there is very little place for exemptions in the law, including the application of the fair use doctrine.¹⁷⁹ However, the application of the doctrine in real space has important effects—resources may be efficiently allocated and wealth distributed between private and public interests. The implication of applying fair use in real space is pivotal to the public's use of information goods for purposes such as research, education, and building new works from existing ones.

The fair use doctrine will better serve to balance private rights and public interests if the doctrine is construed with the public interest aim in mind. The four factors to be considered under § 107 do not take into account the interests of society in producing new works from old ones and in using literary and artistic works for the purposes of education and growth.¹⁸⁰ The public interest in having access to works is not read into the framework of § 107.¹⁸¹ Indeed, this point was made by Professor Shubha Ghosh when he noted that fair use analysis has always been framed to resolve conflicts between two private rights holders.¹⁸² In *Sony*, the doctrine was applied between the motion picture producers and the VCR producer.¹⁸³ In *Napster*, fair use was applied between the recording companies and the software producer.¹⁸⁴ In neither case was the right of the public a consideration in determining whether the use of the work was fair or not.¹⁸⁵ In both cases, the analysis focused on the effect of the new technology on the market and economics of the creative content business.¹⁸⁶ Professor Ghosh argues for a fair use construction that does not place the market as the central point of analysis.¹⁸⁷ He argues that markets are just one part of the equation that

178. GOLDSTEIN, *supra* note 156, at 224.

179. *Id.*

180. *See* 17 U.S.C. § 107 (2000).

181. *Id.*

182. Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 484 (2003).

183. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

184. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd*, 239 F.3d 1004 (9th Cir. 2001).

185. *See Sony*, 464 U.S. 417; *Napster*, 114 F. Supp. 2d 896.

186. *See* sources cited *supra* note 185.

187. *See* Ghosh, *supra* note 182, at 484–91.

strikes the balance in copyright.¹⁸⁸ Other institutions that disseminate information goods to the public, such as libraries and universities, must play a role along with markets to determine the effect of an act upon the public.¹⁸⁹

Professor Ghosh's argument is a compelling one. In the search for a balance between private rights and public interests, Professor Ghosh argues that copyright law is a form of privatization¹⁹⁰—the government's way of getting authors to produce literary and artistic works for the public. If that is the case, then there is a need to understand that public good underlies the law and that there may be a need to de-privatize copyright law in order to achieve the public good.¹⁹¹ Literary and artistic works are not purely private artifacts to be protected by property rights as an entitlement.¹⁹² Rather, the grant of a right serves a larger purpose: literary and artistic production for society's ultimate benefit. Construing copyright as a form of privatization shifts our focus from economics or technology as the primary tools for achieving a balance between private rights and public interests.

As has been argued in this Article, economic theories and technological developments show that there must be a balance between private and public interests, but neither offers answers to where the balance should be set. Conceiving of copyright as a system of privatization permits the insertion of public values in copyright analysis, including fair use. This is particularly important when technologies have made consumers of literary and artistic works into producers of new or derivative works. If technologies have made markets perfect and transaction costs zero, the conception of fair use with the public interest will allow the public to use literary and artistic works for purposes of education, growth, and research.

188. *Id.*

189. *See id.* at 489–91.

190. *See id.* at 484.

191. *See id.* at 390.

192. *See id.* at 413.

Copyright debates in the nineteenth century were infused with questions of democratic values and representation, particularly as the freedoms of press and speech were implicated. Copyright's development in the twentieth century and current debates over copyright and developing countries are intimately connected to the establishment of accountable government institutions and reliable, independent media. Copyright theory has intimate links with broader theories of democratic governance.

Id.

The second aspect of copyright that ensures public access to literary and artistic works is the idea of originality and the idea-expression dichotomy. The U.S. Copyright Act expressly provides that ideas are ineligible for copyright protection¹⁹³ and the courts have consistently affirmed the freedom of the public to use ideas underlying works to produce new and creative works.¹⁹⁴ In *Baker v. Selden*,¹⁹⁵ a system of ruled lines and headings was used to illustrate a method of bookkeeping and the Supreme Court had to answer the question of whether copyright existed in the system of bookkeeping if there was copyright in the book, itself.¹⁹⁶ While it was clear that the book conveyed information on the subject of bookkeeping and contained detailed explanations of the art of bookkeeping, it was more evident to the Court that there was a clear distinction between the book and the art that it was intended to illustrate.¹⁹⁷ Novelty in the art expressed in the book should be protected through the patent system.¹⁹⁸ “To give to the author of the book an exclusive property in the art [through copyright],” when no examination of its novelty has ever been officially made, would be to fraud the public.¹⁹⁹ Unless a patent was obtained for the art contained within the book, the public should be able to have access to the ideas contained in the book.²⁰⁰ Copyright in the book was separate from the ideas in it.²⁰¹ While the public cannot print and publish the book or any material in it, the bookkeeping system therein was an art that the public could use and practice.²⁰²

The decision of the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*²⁰³ reflected a more definitive approach to the question of originality. The Court denied copyright protection to compilations of facts unless the compiled facts, by their selection and arrangement, displayed the requisite originality necessary to protect the

193. 17 U.S.C. § 102(b) (2000). Again, the Copyright Act states that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Id.*

194. *See supra* note 30 and accompanying text.

195. *Baker v. Selden*, 101 U.S. 99 (1879).

196. *Id.*

197. *See id.* at 102.

198. *Id.*

199. *See id.*

200. *Id.* at 103.

201. *Id.* at 99.

202. *See id.*

203. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1990).

compilation under copyright laws.²⁰⁴ In *Feist*, the Court had to decide if copyright protection could exist for the publication of a typical telephone directory that consisted of white pages and yellow pages.²⁰⁵ The Court held that there is a copyright in the directory as a whole because it contains some forward text and some original material in the yellow pages.²⁰⁶ However, the white pages were not protected because that material did not meet the prerequisite of originality required for protection.²⁰⁷ “Sweat of the brow” was not a sufficient justification for the grant of a copyright in the work—a copyright may not be earned merely as a reward for the hard work accompanying the compilation of facts.²⁰⁸ The Court held, however, that the grant of a copyright in factual compilations is possible in situations where the facts are selected, coordinated, and arranged in such a manner that they satisfy the originality requirement.²⁰⁹ To the Court, “[o]riginality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity.”²¹⁰ In this case, the selection of names, towns, and telephone numbers to fill up the white pages was “devoid of even the slightest trace of creativity” and was, therefore, unable to qualify for copyright protection.²¹¹ Although there was sufficient effort exerted to make the white pages directory useful, there was insufficient creativity to make the directory an original work.²¹² The Court went on to make it clear that “copyright rewards originality, not effort.”²¹³

The idea-expression dichotomy, however, may not provide a complete solution to balancing the private and public interests in copyright. Professor Amy Cohen argues that the idea-expression dichotomy does not sit comfortably in copyright law because it is difficult, if not impossible, to separate ideas from the expression of a work.²¹⁴ To provide protection for expressions of creativity in works and

204. *Id.*

205. *Id.*

206. *Id.* at 361.

207. *Id.* at 362–63.

208. *Id.* at 359–61.

209. *Id.* at 348, 358.

210. *Id.* at 358.

211. *Id.* at 362.

212. *Id.* at 362–63.

213. *Id.* at 364.

214. Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression*

to make the underlying ideas available to the public as building blocks of creativity may not be possible because new artists may find it difficult to extract the “idea” without the “expression” of an existing work.²¹⁵ On this argument, it is said that the idea-expression dichotomy cannot provide an objective framework for the courts to separate parts of a work that ought to be protected in favor of the author and parts of the work that ought to fall within the public domain.²¹⁶ Without an objective or philosophical basis to distinguish ideas from expressions in works of art, an assessment of ideas from expressions will be a subjective determination based on a judge’s artistic value of the work.²¹⁷ However, we may refer back to copyright law as an institution to further the public good in addressing what should constitute free ideas and what should be protected as expressions. Parts of works that society can use as building blocks to further education, learning, and growth should be made available as ideas. The test of what constitutes free ideas is whether the idea can be used in another work without seeming like the original expression. Putting ruled lines in a book for accounting purposes, for example, is an idea that will prevent society from benefiting if it is exclusively protected. Plots of plays, story lines, and research findings are ideas that society should be able to use.²¹⁸ The way these ideas are communicated to the public and the manner in which plots, story lines, and music are expressed to capture society’s attention and imagination are justifiably expressions to be protected to encourage creative authorship.

Fair use and the idea-expression dichotomy allow institutional intervention into markets for information goods to ensure that rights holders do not extend rights into realms of the public where literary and

Dichotomy and the Inevitability of Artistic Value Judgments, 66 *IND. L.J.* 175 (1990).

215. *Id.* at 231.

216. *Id.* at 219.

217. *Id.* at 231–32.

218. See Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 965, 966 (1990). Professor Litman addresses the fundamental building blocks of ideas, which inspire the production of literary and artistic works. She describes the process of creation as follows:

[c]omposers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights’ characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already “out there” in some other form.

Id. at 966–67.

artistic works are needed. Technologies, particularly the Internet, have redefined copyright markets and made bundling, differential pricing, and media subscription services tools to correct market failings where prices of goods have not been accurately reflective of the values consumers place on literary and artistic works. Transaction costs are almost zero, and fair use, which has been the judiciary's response to failing content markets, may no longer serve a purpose in correcting market inefficiencies.²¹⁹ The only way to ensure that private rights do not overwhelm public interests is through copyright as an institution to encourage authorship for public benefits. In the concluding paragraph of *Copyright's Highway*, Professor Goldstein expresses that "[t]he main challenge will be to keep . . . [copyright's] trajectory clear of the buffets of protectionism and true to copyright's historic logic that the best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works."²²⁰ Rights are important to encourage authorship and respect for copyright as an institution.²²¹ These rights must encourage authors to produce literary and artistic works first before the public interest can be met. Nonetheless, it is equally important to recognize the rights as serving an end—that of providing literary and artistic works for the public's benefit. Internalizing every benefit in society from the production of literary and artistic works is not the intent of copyright law.

CONCLUSION

Consumers and the public in general derive value from the creation of literary and artistic works—we must recognize that authorship is the primary activity that contributes to this benefit. Private rights may be the most feasible manner to encourage authorship. Through the guarantee that investments in producing works will be recovered, authors are more inclined to engage in creative production, even though there may be ancillary reasons to engage in these forms of activities, such as deriving satisfaction from producing art and being able to contribute to the greater societal good. Realistically, however, authors must be remunerated for their work. The patronage system of

219. See Boyle, *supra* note 136, at 2014.

220. GOLDSTEIN, *supra* note 156, at 236.

221. See Alina Ng, *Taking Copyright Seriously: Abridging Rights Is More Serious than Inflating Rights* (Berkeley Elec. Press, Paper No. 1479, 2006), available at <http://law.bepress.com/expresso/eps/1479/>.

remunerating authors for their works is arguably still intact; the production of creative works, however, has just been delegated to private firms.²²² In any event, the intent remains the same: literary and artistic works are to be produced for the public interest.

The grant of property rights with the underlying purpose of furthering general social goals of learning and education comes with its challenges. The nature of information, being public and essentially non-rivalrous and non-exclusive (particularly in real space), creates market externalities that cannot and should not be fully internalized by the producer.²²³ Some consumer surplus will not be captured and free riding will occur. However, these should be acceptable market conditions for information goods. Copyright addresses these inefficiencies and, to a large extent, corrects them. Technologies have also contributed significantly to correcting market failures in markets for information goods. Exemptions in law, such as fair use, may have very little effect in addressing market failures because the networks of the Internet build connections between producers and users for consensual bargaining to take place.

The law matters, however, because in real space, a large segment of society does not have access to creative works and information for development and growth.²²⁴ There is an increasing global awareness that information and knowledge are necessary for development and progress. An example is the Access to Knowledge (A2K) movement that has contributed to the understanding that the law is not merely an instrument for protecting private interests²²⁵ but is also an instrument that can provide access to works that will benefit developing communities around the globe. The law matters because it serves to foster larger social goals through the grant of private property rights. By encouraging private firms to produce literary and artistic works

222. Ghosh, *supra* note 182, at 500. "Copyright . . . diverges from real property in terms of the ends it is designed to achieve. . . . [C]opyright serves as a means of privatizing government functions of cultural production." *Id.*

223. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 *COLUM. L. REV.* 257 (2007) (identifying the benefits of positive externalities or spillovers that benefit society as a whole).

224. The World Intellectual Property Organization's Development Agenda identifies the digital divide and knowledge gap as separating the wealthy nations from the poor. *See Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WO/GA/31/11 (Aug. 27, 2004), available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf.

225. *See* Access to Knowledge Movement, Wikipedia, http://en.wikipedia.org/wiki/Access_to_knowledge (last visited Apr. 20, 2007).

through property rights, larger social goals will be fulfilled. Ultimately, copyright's empire is not about how far property rights should extend, but rather how to encourage and support the proper conditions for authorship to flourish.

Copyright's empire is not as much about entitlement as it is about values. The law matters because without the proper balance between private and public interests, society's needs cannot be met. Copyright's empire is about two things: authorship and society. There must be proper conditions that will encourage authors to produce literary and artistic works. Without rights provided by the law, authorship will not flourish. The connections authors make with their consumers to provide works that society values will not happen without a market-based system of resource allocation. Importantly, literary and artistic works are also the main sources for education and growth necessary in order for society to develop. Without these works, society will reach a standstill in the process of development. Society will stagnate the moment the production of literary and artistic works ceases. The law must ensure that society continues to have materials to develop. This can only be done through a system connected to society via free market supply and demand mechanics.

Ultimately, copyright's empire is vast. It begins with the recognition that private rights are important, and it ends with the acceptance that society's goals are indefinite. Only through rights protected by law can we meet the goals defined by society.