

Authorship, Incentives for Creation, and Copyright in the Digital 21st Century

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Abstract: Copyright in the United States is under enormous stress in the digital age. The cause of this stress is often described in technological terms, yet there are deeper systemic policy and legal factors at play. Specifically, there is an ever-increasing, and increasingly obvious, disconnect between the constitutionally based justification for copyright, and copyright's lived out implementation. That is particularly true regarding two key justifications for the expansions of copyright protection that have occurred since 1790: the concept of the author, and the necessity of providing a high level of control and financial incentives to authors to encourage the production of socially valuable works.

This paper examines both of these justifications for expanded copyright protection and finds them unproven and, in fact, significantly lacking force under both philosophical and empirical analysis. We suggest that the U.S. abandon those justifications for copyright in today's digital world. We offer eight principles upon which a more integrated and relevant copyright system could be based, one in which policy, law, and practice could be brought into coherence so that today's stresses on copyright would be minimized, and the Constitutional charge to promote "the Progress of Science and useful Arts" would be maximized for society as a whole.

Prologue

Copyright, in a word, is about authorship. Copyright is about sustaining the conditions of creativity that enable an individual to craft out of thin air, and intense, devouring labor, an *Appalachian Spring*, a *Sun Also Rises*, a *Citizen Kane*.

Paul Goldstein

The process of authorship, however, is more equivocal than that romantic model admits. To say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliché, invoked but not examined. But the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.

Jessica Litman

Introduction

Toy Story, an award winning animated film which grossed over \$350 million, lists eight people as writers in the credits and dozens as "visual artists." The copyright to this extremely valuable work is held by Walt Disney Studios® and Pixar Animation Studios®. So who are the "authors"?¹

This is not a trick parlor game question. Instead it is a question that goes to the heart of U.S. copyright policy, a system of law which is under great stress in today's digital environment. The cause of this stress is usually described in technological terms: digital technology makes possible perfect copies at essentially no cost (and, on the other hand, it is important to note, perfect post-sale control of the use of works). Yet digital technology is not the first new

technology that copyright law has had to deal with during the past two hundred years, and during that time, through both statute and court cases, it has managed to survive—at a price.

The price is a steep one: an ever-increasing disconnect between the constitutionally based justification for copyright and its lived out implementation. We now have a system in which the policy rationale for copyright law has diverged in a significant way from its practice and application. That is particularly true regarding two key justifications for the expansions of copyright protection that have occurred since 1790: the concept of the author, and the necessity of providing a high level of control and financial incentive to authors to encourage the production of socially valuable works, particularly in a world of perfect digital copies.

In this paper, we use historical, philosophical, and legal analysis tools to attempt to understand how the concept of “author” has been used to provide a policy justification for current forms of copyright;² describe policy claims regarding the necessity of financial incentives as the *sine qua non* of guaranteeing a steady supply of valuable new works to society, claims that have only grown stronger in the digital environment; identify some of the key discrepancies between justification and implementation of copyright; and finally suggest some principles that could bring policy justification into conformance with actual copyright practice, and perhaps help to reduce some of the stress on the system by fitting both policy and practice to the world in which they now operate.

Context

In the U.S., copyright law draws its authority from Article 1, Section 8 of the U.S. Constitution. On that fact there is agreement. But while the Constitution stipulates an end—“To promote the Progress of Science and useful Arts;” and a general means “by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” —it does not supply a set of instructions for implementing that “exclusive Right,” nor does it define precisely what type of “Right” the framers had in mind. “Copyright’s progress mandate demands that we develop a system of rights and rules to foster creativity. It does not tell us how.” (Cohen, 2000)

The set of instructions we have fashioned to fulfill the founders’ charge is copyright law. Copyright began modestly in the U.S., offering copyright protection to authors for books, maps, and charts for 14 years with an option of an additional 14 years to be claimed by the author, providing he or she were alive to benefit from the additional term of protection. The term of 14 years was consistent with the English Statute of Anne of 1710, which, in turn, established its term of protection by historical analog to patents. Over time in the U.S., the distinction between “Inventions” and “Writings” has become more pronounced so that while the term of patent protection is currently usually 20 years, the term of copyright protection is the life of the author plus 70 years, and the scope of copyright protection now covers any work of authorship “fixed in any tangible medium.”

The distinction between “Authors” and “Inventors” and the different ways in which they are treated in U.S. intellectual property law reflects a conception of the author as creating new works “out of thin air.” We elevate the creative nature of the author’s work beyond the practical nature of invention, giving rise to a term of protection for the author that is, practically speaking, seven or eight times the duration offered to the inventor. Why? What is it about the work of authors that leads to such a disparity?

Authorship, Authors, and Authors’ Rights

William Wordsworth attributed that difference to “genius:”

Genius is the introduction of a new element into the intellectual universe: or, if that is not allowed, it is the application of powers to objects on which they had not before been exercised, or on the employment of them in such a manner as to produce effects hitherto unknown. (quoted in Woodmansee, 1984)

While the term “genius” does not literally find its way into U.S. legislation or court cases very often, belief in its power is certainly still present in both, as well as in legal discourse, and forms part of the unspoken assumption of what authorship is and why it deserves a higher degree of protection than mere invention.

The Constitution does not define the term “Authors” nor does the U.S. Code, nor, in fact, has any court. Instead, courts have gone out of their way to avoid making judgments about “esthetics” or “creativity,” let alone “genius.” In avoiding esthetic judgments, the courts have generally tested for “originality,” while continuing to use at least a “modicum” of creativity when necessary to draw lines between what is protected and what is not. (Patry, 1986) The problem is that copyright is “an institution built on intellectual quicksand” (Rose, 1993) so those lines shift, sometimes uncomfortably, and we wind up with a situation in which “there is ample precedent deciding almost every copyright issue in almost every conceivable direction.” (Litman, 1990) This is not surprising given the statutes and legal tradition that the courts must interpret.

The statutory yardstick for providing copyright protection is “original works of authorship,” yet authorship is not defined. The history of what authorship means and how the concept evolved both philosophically and legally is wide and deep.³ That history has left us with a number of claims instilled in our legal tradition and culture, even if not specifically in our legal codes.

Article 1, Section 8 speaks of “the exclusive Right.” But the Founders are silent on what the origin or type of right that is. There is no record of Congress’ discussion on the passage of the first copyright act in 1790, so we have no guidance about the nature of authors’ rights from that source, either. There is no specific mention of a property right *per se* for authors in the Constitution or in the first copyright law, although over time copyright has largely come to be viewed as a property right in the U.S., with all of the attendant assumptions that analogies to physical property carry.

At the time of the framing of the Constitution, there were several cultural conceptions of the source of what we might call an authorial “Right.” The liberal idea of Lockean natural rights was very much in evidence, and was complemented by a developing Romantic vision of the author expounded above by Wordsworth. As the Romantic movement grew through the 19th century, so did the image of the author as an individual creator, one who makes new creations *ex nihilo* or, at the very least, transforms experience and expresses his inspiration in never-before seen “forms.”⁴ By the mid-19th century, Ralph Waldo Emerson reflected this view in an American cultural context with his famous line that “The Man is only half himself; the other half is his expression.” (Emerson 1884)

This is, of course, quite a different view of the author than existed in previous centuries in Europe. Even into the 18th century,⁵ authors were seen by many as vessels chosen by God to reveal truth to humanity: inspiration (literally, “to breathe into”) came from a higher power. The author was important not as a creator but as a translator or a channel for truth.⁶

By the time of the framing of the Constitution, the centrality of inspiration to the authorial task was still paramount, but the source of this inspiration had largely, though not completely, moved from without to within, from the hand to God to the author's genius. While there could be little philosophical or legal justification for recognizing an ownership right of a specific author in material that came directly from God and was therefore the common property of all, there was certainly justification in recognizing a right – even a natural right – in a work of personal expression of individual inspiration and genius.

Once the idea of the author as the originator of inspiration became established, the question of rights followed quickly. But what kind of right does an author have to his work? Many argued that this right was a natural one, and as such was enshrined in the common law. While the language of natural rights still arises in debates about the scope of copyright and the protection of authorial rights in legal literature and even in the halls of Congress today, in both a legal and philosophical sense, the natural right theory as a justification for copyright faces several seemingly insurmountable problems.

First of all, a natural right cannot be removed. It is, in the words of Jefferson in the *Declaration of Independence*, “inalienable,” and was widely viewed as such at the time of the Constitution's drafting. Yet copyright is limited in term: it disappears after some length of time, no matter how long Congress chooses to make that term. Second, the concept of “work for hire,” currently enshrined in U.S. copyright law, disconnects the actual authors of a work from ownership rights in the work, e.g., in the *Toy Story* example above. This could not happen with a natural right—the author would still be the author no matter who the employer might be.

Furthermore, “moral rights”⁷ are a part of a natural right to the product of one's inspiration. Yet, with the limited exception of creators of visual art mentioned in the U.S. Copyright Act, S. 106a, authors in the U.S. have no moral rights to their work, while authors in most continental European countries do. When the copyright passes from the author to another entity in the U.S., so does the complete control over use of that work, no matter what effect a subsequent use by the new rights holder may have upon the integrity of the work itself, or upon the reputation of the author. This is not the stuff of a natural right.

Perhaps then, the Constitutional “Right” is a property right? If so, what kind of property is involved in the right? This discussion rages on, with the spectrum of opinion ranging from an author's rights being full blown property rights bestowed by nature and not limitable in any way (Nozick, 1974) to a more mainstream a vision of “intellectual property” (a rather recent term which seems to settle the debate before it is begun) being a type of property just like physical property governed by Wesley Hohfield's “bundle of rights” theories (Lipton, 2004) to views of intellectual property as a sort of “semi-commons” (Heverely, 2003) to the idea that an author's right to copyright protection is not an absolute property right at all (Mitchell, 2005). It is a rare volume of a law journal even today that does not contain at least a few pages dealing with some aspect or other of one of these views, yet it is clear that the dominant rhetorical position in the U.S. is that “intellectual property” is, when all is said and done, real property, pure and simple.

But if the “Right” referred to in the Constitution is, in fact, a property right, how do we comfortably include the idea of compulsory licensing into this view? Compulsory licensing, currently written into copyright law in the U.S. for music, shifts a key aspect of an author's property right—the right to refuse access—to a liability right, the right to compensation. (Mitchell, 2005) One could argue that the fact of compulsory licensing does nothing to reduce the claim that intellectual property is property. Can not “real estate” property be taken with

compensation through eminent domain? While defenders of authorial rights as property rights could make this claim, they generally do not, and with good reason.

Eminent domain is exercised by the body politic when a private holding is so critical to the social good that private ownership must give way to the public good. This, in the case of knowledge embodied in copyrighted works, leads property rights advocates down a very slippery slope very quickly. If the justification for compulsory licensing is the same as that of eminent domain, then any type of knowledge or creation that society, after due process and deliberation, decided was critically important for the public good could be taken from private ownership by the same process, whether the rationale is expressed as eminent domain or as compulsory licensing. In either case, the author's property right disappears by *fiat* and is replaced by a liability right to compensation.

Inherent but seldom discussed in debates about the nature of the author's right is the question of why the U.S. government, as the representative of the body politic, should enforce the economic value of an authorial right. The underlying assumption must be that the works produced by authors have social value as well as economic value because ensuring social value—"Progress"—is the state's work, as Article 1, Section 8 suggests. Determining economic value is the market's work. Both eminent domain and compulsory licensing bring this unspoken, and, it seems today, largely forgotten assumption to the fore in cases when the social value of some "property" is needed immediately by society, and therefore an individual's property right is terminated for the greater good. Although the justification for compulsory licensing of music has to date been different from that of eminent domain, the outcome is the same: the owner loses control of access—a core right of private property—and is left with compensation at a rate decided by the government rather than by the market. There is no legal reason to prevent us from looking at compulsory licensing in the same way that we look at eminent domain. In short, "works made for hire," compulsory licensing, and limitation of term all seem to belie claims of the existence of either a natural right or full property rights for authors. How then can we justify copyright, especially the wide scope and long duration embodied in current law?

Incentives, Authors, and Social Value

Those who champion the current copyright regime still may respond that even if we cannot designate with a high level of confidence either a "natural right" or a full "property right" as the authorial "Right" in the Constitution or in current copyright law, we can at least claim with confidence that whatever the true nature of that right may be, it is still necessary "To promote the Progress of Science and useful Arts," that is, to create social value. And that is precisely why the government must be involved in enforcing ("securing") that right. However wobbly the philosophical justification for an author's right may be, the economic fact is that there would be no incentive for authors to create works of social value absent the economic incentive that copyright provides, and that fact in itself is justification for copyright as it presently exists.

This is an empirical claim, and so its validity deserves to be tested empirically.

While the underlying Constitutional justification for both copyright and patents arises from the same source, the way that we treat "Authors and Inventors" in terms of generating "Progress" is astonishingly different. To get a patent, an inventor must demonstrate novelty, utility, and non-obviousness. An author, at present, must demonstrate that a work has been fixed in a tangible medium and, essentially, that it has not been copied.⁸ No demonstration of utility is required. As we have seen, the courts have been hesitant to make any sort of judgments about "creative" works in part because, in Justice Holmes' words: "it would be a dangerous undertaking for

persons trained only in law to constitute themselves final judges of the worth of pictorial illustrations.” (Bleistein v. Donaldson Lithography Co., 188 U.S. 239 (1903))

That sentiment seems to have found its way into statute as well.

Efforts to require an “appreciable amount of creative authorship” were rejected during the omnibus version of the 1909 [Copyright] Act, with Congress expressly stating that the test of originality “does not include requirements of novelty, ingenuity, or aesthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.” As under the 1909 Act, “original” under the 1976 Act means “little more than a prohibition of actual copying.” (Patry, 1986, references omitted)

Thus, while inventions must demonstrate, at least in theory, some sort of usefulness or social value, and the invention becomes available to the public domain in 20 years, copyrighted works have no such social value determination made as a condition of granting copyright and are kept from public domain use, generally today for well over 100 years. And, of course, works eligible for copyright are not limited to the “pictorial illustrations” Holmes was referring to in a particular case. They now can include the house chores list scrawled on the back of a napkin, the email note saying “remove me from your spam list,” and all the doodles made by millions of bored students in textbook margins all over the country. One might reasonably ask: where is the social value, where is the “Progress” in these protected works? That is, after all, the assumed justification for such all encompassing grants of economic rights under copyright. The answer is certainly not to be found in any determination made by the legal community:

Everyone agrees that the purpose of the copyright system is to promote progress. At the same time, though, skepticism about the law's ability to define the substance of progress runs deep within copyright case law and theory. Legal decision makers and scholars have quite properly doubted their own ability to evaluate artistic or literary merit, and have worried that efforts to do so would result in an inappropriately elitist and conservative standard. In addition, there is room for substantial debate about whether the metaphor of forward motion leaves out other important measures of what “progress” is or might be... This agnosticism about prospects for value-neutrality has led copyright law and scholarship to eschew debates about the substance of progress in favor of debates about rule structures for enabling progress. (Cohen, 2000)

We face here the first problem in the claim that the economic incentives offered by copyright are necessary to promote progress, and to use the full force of state power to enforce those economic incentives given to authors. If there is no “Progress” created through a work, what justifies the grant of copyright? Certainly not the Constitution, based on the specific “means-ends” language construction of Article 1, Section 8.

But even if we were to grant that the notion of “progress” is in the same definitional category as pornography and, reasoning in an analogous way to Justice Stewart’s famous dictum, “we may not be able to define progress but we know it when we see it,” another major problem remains for the claim that economic incentives are necessary for authors to create works of social value. That problem is straightforward, even if the definition of progress is not: there is no empirical proof that this is the case, and, in fact, there is a good bit of empirical proof to the contrary.

Eben Moglen speaks of a (somewhat) imaginary creature called an “econodwarf” who assumes that no author does anything except for economic gain, a strong version of the “need for incentives” position. This position, he finds, is simply not defensible in the face of experience: “But no matter how often he hears *Don Giovanni* it never occurs to him that Mozart’s fate

should, on this logic, have entirely discouraged Beethoven, or that we have *The Magic Flute* even though Mozart knew very well he wouldn't be paid." (Moglen, 1999) While it may be extreme to say that authors never produce anything for other than economic benefit, it might be reasonable to take a somewhat weaker position that claims that there would not be an adequate supply of creative works in the absence of the economic incentives that copyright provides to authors.

The problem with this assertion is that there is currently no cogent economic theory nor any significant empirical evidence that demonstrates that it is true.

In addition, relatively little is known about what motivates people to engage in creative activity and how those influences differ from the perhaps more pecuniary motivations of those who acquire the copyright to creative works for purposes of reproduction and distribution. In other words, economic theory has not yet specified a "creative production function." That is not to argue that copyright protection is not important to the financial ability of individual creators to devote themselves to their craft. Economists may with some confidence predict that abolishing copyright protection altogether would reduce the level and quality of creative output. However, they cannot easily predict exactly how a less dramatic change in compensating copyright owners—through differential pricing schemes, for example—would affect the number or quality of creative works being produced and distributed.

... Creators, for example, may be more likely than distributors to be motivated by nonpecuniary factors—creative drive, a desire for attribution and recognition, and the need to ensure the integrity of their work, for example—while distributors may be more likely to respond to monetary incentives. As a result, the existence of copyright—in particular, exclusive rights over subsequent use—may simply motivate distributors of copyrighted works to engage in marketing and promotional activity, which do little to ensure the future supply of creative works. (Congressional Budget Office, 2004, references omitted)

In fact, there is a rich body of research literature that bears out the fact that authors create for many reasons of their own, and that economic motivations, while part of the mix of reasons, are often near the bottom of the list.

Literature on volunteering in general is extensive and consistent: people are willing to contribute a great amount of energy and creativity for other than economic reasons.⁹ But, arguably, motivations for volunteering to help the Boy Scouts or a church group may not be the same as those of creating a copyrightable work. However, there is also a rich body of literature about motivations for contributing to open source software.

Software has been copyrightable under U.S. law since 1983, and so offers a direct source of evidence that economic benefits are not a prime motivator, if they are a motivator at all, for the tens of thousands of people who contribute to a copyrightable product, open source software. Open source software, which largely runs the Internet server infrastructure today, seems to be a much greater creator of social value than a private grocery list, and its authors do not seek economic incentives to create.

Academic theorizing on individual motivations for participating in F/OSS [Free/Open Source Software] projects has posited that external motivational factors in the form of extrinsic benefits (e.g.; better jobs, career advancement) are the main drivers of effort. We find, in contrast, that enjoyment-based intrinsic motivation, namely how creative a person feels when working on the project, is

the strongest and most pervasive driver. We also find that user need, intellectual stimulation derived from writing code, and improving programming skills are top motivators for project participation. (Lakhani and Wolf 2005)

This general comment summarizes the conclusions of many researchers (e.g., see Hars, 2002, Hertel, 2003, among others). Numerous theories to explain this phenomenon are currently under investigation, ranging from applications of anthropological theories of “gift economies” (Zeitlyn, 2003) to social network theory (Madey, Freeh, and Tynan, 2002) to leadership theory (Wynn, 2004). Why this phenomenon not only has occurred but is growing is not the point here. Rather, for our purposes, the importance is that there is clearly empirical evidence that contradicts even the weak assertion that, in the absence of copyright’s present incentives for authors, there would be a significant underproduction of creative works of social value.

Other empirical evidence against this assertion exists in the well over 50 million creative works licensed through the Creative Commons (www.creativecommons.org) whose authors specifically choose to create and distribute their works in the absence of some or all of copyright’s protections. The growing importance of the Open Access Scholarly Publishing movement and the existence of academic publishing in general also cast doubt on the exclusive—or even primary—role of economic incentives in the production of many new creative works of social value.

In sum, empirical evidence invalidates blanket assertions of the necessity of economic incentives to encourage the production of new creative works.

Economic theory itself also casts doubt on the effectiveness of copyright’s current scope and incentives in producing social value. In economic terms, a rights grant which is too monopolistic, especially in the absence of any way to determine whether a new work does generate social value or progress, is likely to attract too many resources to produce such monopolistically protected works at the expense of “non-works”—non-copyrightable products such as toothpicks or automobiles or even purely factual databases.

Determining copyright’s optimal scope therefore requires a determination of how much and what sort of protection copyright needs to provide to address those differences between works and non-work products that would, in the absence of legal protection, likely lead the market to underproduce works of authorship. To address those differences, copyright must provide that degree of protection which will lead an individual to expect roughly the same price for her resources whether invested in a work or a non-work product, when the two investments generate roughly the same social value. While limited, the available empirical evidence, together with a common sense analysis of the relevant differences between works and non-work products, suggests that copyright should prohibit only exact or near-exact duplication and certain nontransformative derivative uses of a copyrighted work to ensure such a fair price. Providing such protection should tend to ensure a consonance between price and marginal social value that will lead individuals to devote their talents and resources to the highest-valued use, whether that be the creation of additional works or additional non-work products. Providing copyrighted works more extensive protection would be undesirable—not because it would limit access to the resulting works, though it may do that as well—but because it would draw resources into the production of additional works when those resources would otherwise have been more valuably used elsewhere in our economy. (Lunney, 1996)

Boldrin and Levine (2002) point out another dimension of copyright's economic problem. This one, the increasing ability of copyright owners to control after sale use of a work through copy protection, they view as "especially pernicious because the potential economic damage – think of abolishing all computers because they can be used to pirate music – bears no relationship to the underlying value that is being protected."

Once again, the question of progress and social value comes to the fore, and whether on empirical grounds or on theoretical economic grounds, copyright's economic incentives are, at best, not clearly established as effective in stimulating authors to create new works; or, at worst, proven ineffective for achieving the Constitutional mandate "To promote the Progress of Science and useful Arts."

So we arrive at the realization that the rhetoric about the role and rights of the author and about the need for large economic incentives for authors to produce new works is empirically unverifiable rhetoric. Even if that is so, why does that matter for our system of copyright?

The Disconnect Between Policy and Implementation

As we now see, the Romantic visions of the author that are rhetorically used to justify extensive rights for authors under copyright simply do not correspond with the present practice of copyright. The deference to "genius" that motivated the distinction between a 20 year grant of patent and the 100+ years granted to copyright owners, even if defensible as a reward for genius, simply does not apply to a mundane grocery list. Under the law, the grocery list receives just as much protection as the work of the Pulitzer Prize winner, yet the rhetorical justification—and often court decisions and congressional debates as well—assumes that every new "work" is "literature for the ages" (or at least has social value and forwards progress) rather than that some are simple lists of today's grocery items, even if the ordering is "original."

How and why this happens is an interesting question, but one which is beyond the scope of this conversation. However, an observation by Debora Halbert offers a suggestion of a possible cause that would be recognized by James Boyle, Jessica Litman, Mark Rose, and others, although Halbert gives more credence to the Romantic vision of authorship than the others would. Halbert is speaking about software but the point applies to any copyrightable type of work:

I do not wish to argue that writing software is uncreative or inartistic. Rather, my point is that the creative genius of the individual author is developed in order to make arguments of copyright fit, then creativity and authorship is undermined and obscured by the large industries that actually own this property. In essence, the romantic myth of authorship may have validity, but within the vast complex of industrial production it is merely a ploy used to perpetuate a certain economic situation.

Within the private property/legal nexus the assumption that protection and proprietary rewards are needed to encourage individuals to create is used to perpetuate intellectual property regimes. The proprietary author is naturalized and the fact that many individuals are not motivated by profit is obscured.

Furthermore, virtually all disadvantages cited are in terms of dollars lost.... Again, like the booksellers of old, those who own the means of dissemination benefit from the process. (Halbert, 1994, references omitted)

The creation of a "work made for hire" category in copyright law lends support to this view. While more and more copyrights are issued for corporate "works made for hire," products in

which the actual authors have no right, the justification for these copyrights nonetheless continues to rest on the Romantic idea of the individual genius creating *ex nihilo* for the benefit of all of society.

If we are to hold to the current justifications of copyright, we must not only grant that the “genius of the individual author” argument still holds in the age of “works made for hire,” we must also grant that the individual genius, while producing *ex nihilo* works of great social value is doing so only because of the economic incentives copyright offers. The fact that this claim has never been demonstrated to be true, and that evidence suggests it may very well be false, is beside the rhetorical point.

From a policy perspective, we must recognize that we have a copyright system which, as implemented, is simply unbelievable based on its justification of granting authors rights and on the necessity of economic incentives. This disconnect is taking its toll. The well known phenomenon of a populace simply ignoring laws that it finds unbelievable may, for example, be contributing to the current alleged widespread violation of copyright in the digital realm. But whether or not that is the case, it is quite clear that battles are raging over whether copyright is just to users as well as owners, whether it is effective in actually making available creative products of social value,¹⁰ and over the level of involvement the state should have in its enforcement—even to the point of drastically distorting the free market through legislation mandating how digital machinery must be constructed.

In short, the current U.S. copyright system is under a high degree of stress.

Recommended Policy Approaches to Relieve the Stress on Copyright

In order to build a justification for copyright that fits today’s facts rather than the other way around, we suggest using the following operating principles:

1. Make policy justification and policy implementation coherent. We should simply drop the justification of copyright based on the Romantic natural rights of the genius author. If that depiction was ever true—and that is doubtful—it is no longer true in the age of corporate copyright owners and “works made for hire.” The primary actors in the copyright bargain are not authors but owners, who increasingly are different.
2. Take the Constitution seriously and actually require that copyright provisions do, in fact, “promote Progress.” Make this the measure for granting of rights, not merely whether something was not copied and was fixed in a tangible medium. As Lenney’s analysis above suggests, we need to empirically discover which copyright provisions will promote what amount of social value under what conditions. This must be an experimental process, not a process based on assumptions as it is now. (Drahos, 1996) We will need to develop metrics that are tracked and that can serve as input to fact-based copyright policy decisions. It will not be easy but it will be necessary to do sooner or later, so it might as well be sooner.
3. Treat materials that can be protected by copyright as *sui generis*, and develop an author’s (or, practically speaking, owner’s) “exclusive Right” on that basis. The metaphor of real property carries too much baggage to be useful any longer: drop it from the copyright vocabulary and recognize that:
copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls in between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute. (Supreme Court of Canada in *Compo Co. Ltd. V. Blue Crest Music Inc.*, quoted in Lemley, 2004)

4. Fit the rights conferred to the desired end. Adopt a *de minimus* principle as the default principle for granting owner's rights under copyright, i.e., make the rights only as extensive as necessary to produce the desired level of new works of social value.
5. Explicitly recognize the role of the public domain as the source of raw material for the creation of new works, and decide how the public domain is to be continually replenished in a timely way. Include explicit recognition of the existence and role of the public domain, and of the author's relationship to the public domain in statute (Mitchell, 2005). Since no one ever creates new works completely out of nothing, we can just as easily look at authorship as a case of appropriating common resources for private use as envisioning authorship as a case of inspirational genius. We need to recognize the contributions of authors but not exaggerate their value in relation to the public domain.
6. Eliminate or define the criterion of "originality" with respect to "authorship." If "original" in the context of copyright means simply "not copied," we should say so. If it means something else, we must say clearly what that is. We cannot hold to the current conception of "original" as the term is used in copyright either logically or practically:

Originality is a conceit, but we like it. To the extent that we are tempted to forget that originality is a conceit, it can be a dangerous principle on which to base a system of property....

Because authors necessarily reshape the prior works of others, a vision of authorship as original creation from nothing—and of authors as casting up truly new creations from their innermost being—is both flawed and misleading. If we took this vision seriously, we could not grant authors copyrights without first dissecting their creative processes to pare elements adapted from the works of others from the later authors' recasting of them. This dissection would be both impossible and unwelcome. If we eschewed this vision but nonetheless adhered unswervingly to the concept of originality, we would have to allow the author of almost any work to be enjoined by the owner of the copyright in another. (Litman, 1990)
7. Identify all parties to the social contract of copyright and affirmatively state what the rights and responsibilities of each are. State all rights affirmatively, e.g., "users have a right to read anonymously;" not simply as defenses, e.g., "fair use." The parties in the social contract must include at least copyright owners and users of copyrighted materials. Some distinction between the original author and the present copyright owner, where applicable, would also be desirable. We may wish to include the public domain or the society represented by the state as parties.
8. Realize that one size does not necessarily fit all. Owners may not be authors, corporations are not people, a grocery list is not *The Sun Also Rises*. For example, Jane Ginsburg speaks of informational works of high authorship (perhaps a narrative history of copyright) or low authorship (perhaps a database of weather information over a decade) and suggests that copyright for the two types should diverge at the point of control over derivative works. (Ginsburg 1990, examples ours) Richard Stallman has suggested that works of fiction be treated differently from non-fiction works for purposes of copyright. (Stallman, 2003) Whatever the detail decided upon, the policy principle should always go back to the central issue: what is necessary to generate social value?

Conclusion

The present U.S. copyright system is under great stress, stress exacerbated by digital technology. While part of this stress is, as it always has been, the challenge of adjusting copyright to new technologies, a major source of stress is the disconnect between policy justification and policy implementation when it comes to conceptions of "Authors," and the

assumptions about the incentives necessary to meet the stated objective of Article 1, Section 8 of the Constitution.

The U.S. copyright system would best be served by abandoning the non-functional and non-factual justifications for copyright protection used today, and by adopting a coherent set of copyright justifications and implementations which correspond to one another and to today's realities. We have suggested some operating principles upon which such a system could be constructed. A copyright system based on those principles would better serve the Constitutional end which copyright is, after all, designed to accomplish, "the Progress of Science and useful Arts."

Notes

1. Section 201 of the Copyright Act recognizes "works made for hire" as "original works of authorship," and vests copyright protection in "the employer or other person for whom the work was prepared," in this example, Disney or Pixar. That fiction does not speak to the question of who actually "authored" the work in the way that the term author is usually used in discussions of copyright.
2. See especially Boyle and Mitchell for extended discussion of this topic.
3. There are a number of works which trace the history and development of the concept of the author and the implications for copyright, among them Boyle, Litman, Mitchell, Woodmansee, and Rose. The emphasis in this paper is not on the historical development but on the effects of that history today.
4. As Martha Woodmansee points out, the philosopher Johann Gottlieb Fichte in 1793 separated a book into "physical" and "ideal" components and then divided the ideal further into the "material" aspect, or content, and the "form," the specific "phrasing and wording" an author uses. We are still splitting idea/expression hairs today in U.S. jurisprudence.
5. "Eighteenth-century France witnessed the emergence not of one modern position on the nature of the author and his relation to the text (i.e., the property-bearing individual) but rather of a modern tension between Diderot's conception of the author as the original creator and hence inviolable proprietor of his works and Condorcet's depiction of the ideal author as the passive midwife to the disclosure of objective knowledge." (Halbert, references omitted)
6. It is interesting to see that opinion expressed even today. Noel Paul Stookey (Paul of Peter, Paul, and Mary) wrote the best selling of piece of sheet music of the past two decades, *The Wedding Song*. He never made a penny from royalties since he felt the song just came to or through him—in his words: "Into every songwriter's life comes a song, the source of which cannot be explained by personal experience." He established the Public Domain Foundation to channel the song's significant royalties to charity. <http://www.pdfoundation.org>.
7. "Moral rights" are rights now codified in the Berne Convention: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6bis, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1986). These rights are not fully recognized in U.S. Copyright law even though the U.S. is

now a signatory to the Berne Convention.

8. Learned Hand's famous description still holds: "Borrowed the work must indeed not be, for a plagiarist is not himself *pro tanto* an "author"; but if by some magic a man who had never known it were to compose a new Keat's *Ode on a Grecian Urn*, he would be an "author," and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." (Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936), aff'd, 309 U.S. 390 (1940))
9. See, for example, Reimer et al, *Motivations for Volunteering with Youth-Oriented Programs*.
10. For example, many works published and abandoned by their copyright owners are unavailable and will remain so for decades under current law. As one example, 187,280 book titles were originally published between 1927-1946. In 2002, 4267 of those were still available for purchase from publishers. The other 180,000+ are still under copyright, some for decades to come. They are not only inaccessible at any price but also often not even traceable if someone wishes to obtain permission for use for a copyright protected purpose. (Schultz 2005)

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