

# A System Out of Balance: A Critical Analysis of Philosophical Justifications for Copyright Law through the *Lenz* of Users' Rights

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## Abstract

*Ultimately, this paper has three goals. The first is to offer an analysis of users' rights under copyright law from four commonly used theoretical perspectives. These are labor, personality, economic and utilitarian theories. In doing so, it will demonstrate that the philosophies that underpin modern copyright law support a broad and liberal set of rights for derivative creativity. It will argue that current treatment of derivative works is unnecessarily conservative from a theoretical perspective. Second, this paper will demonstrate how, in spite of theory that supports a healthy community of derivative creativity, those who practice it have been further disenfranchised by the law. It will argue term limit extensions, increased protectionist treatment of secondary works online, and the functional lack of access to proper licensing mechanisms have rendered users' rights impotent. Finally, in conclusion, it will offer a solution to the apparent imbalance of power in the form of replacing property-based derivative rights with liability rules. The conclusion, in many ways, merits its own paper and is meant as merely a suggestion of direction rather than a formulated solution.*

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## 1. Introduction

With the internet and various other new technologies have come a generation full of creators. The internet is ideally suited for the propagation of amateur creativity and consumer technology has made it easy for the average user to access the necessary tools to make creativity possible. Moreover, the lines between amateur and professional creativity are far more blurred than they were 30 years ago. The content industry is no longer composed solely of a few large corporations yet the rules are still built for such a system. Instead, there are millions of would-be creators online who lack the resources to take advantage of the current system in the same way that their corporate counterparts can. As it stands, copyright law creates a barrier to amateur creativity and a steep paywall to professional creativity. Copyright reform over the last century has led to a dilution, and sometimes disintegration, of both the public domain and the rights offered under exceptions to infringement. This increasingly protectionist approach to the law coupled with the fact that licensing opportunities are often not realistically achievable for average creators has created an environment that shuns derivative creativity. This form of creativity, however, is culturally valuable and should be, to a degree, fostered by the law.

Ultimately, copyright law will forever be a delicate balance between the rights of content owners and the rights of users. Historically, this balance has been struck via absolute ownership tempered by various “safety valves,” which take the form of exceptions, to said ownership or control over a work.<sup>1</sup> Yet, throughout the last few decades, we have seen gross expansion on the ownership side of the balancing scale coupled with arguably synchronous diminution of safety valve provisions that benefit users. While proponents of these changes will argue that they have been necessary to incrementally update an out-of-date system and

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<sup>1</sup> Samuel E. Trosow, *The Illusive Search For Justificatory Theories: Copyright, Commodification And Capital*, 16 Can. J.L. & Juris. 217, 220 (2003). (Arguing that “these safety valves are the fair use/fair dealing doctrine, the idea/expression dichotomy, the originality requirement, the limitation on the duration of copyrights, and the concept of the public domain.”)

keep it aligned with the digital era, the result has been a tangible shift in the balance of power between owners and users. In 2003, Brian Fitzgerald wrote:

[t]he great divide, which has been exacerbated by the rise of the digital generation, is between content owners...and users...My sense is that the theory will fuel the rhetoric of this fiercely contested debate and that the prevailing economic, social, and cultural tradition will define its victor.<sup>2</sup>

This article looks to address the *theory* that underlies these issues. There is much research concerning the philosophical foundations for copyright law.<sup>3</sup> However, the bulk of this research is generally focused on analyzing this relationship from the perspective of authorial rights. This paper has three goals. First, it will analyse what exactly users' rights *should* be. It will do so through analysis of three major philosophical justifications of copyright law within the scope of users' rights. These theories are appropriation, economic, and utilitarian. Second, in doing so, it will make the case that users have been disenfranchised by the current legal system. There is an imbalance of power characterised by extensions of term limits for copyrighted works, increasingly protectionist philosophy for treatment of secondary uses, and a functional lack of access to proper licensing mechanisms for average users. Third, it will argue that a rebalancing must occur to restore users' legal standing but also that the historical property model of copyright law is unsuitable for such a rebalancing and should be restructured accordingly.

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<sup>2</sup> Bryan Fitzgerald, *Theoretical Underpinning Of Intellectual Property: "I Am A Pragmatist But Theory Is My Rhetoric"* 16 Can. J.L. & Juris., 179, 189 (2003)

<sup>3</sup> See e.g.: Sara K. Stadler, *Forging A Truly Utilitarian Copyright*, 91 Iowa L. Rev. 609 (2006); Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 Cornell L. Rev. 1278 (2003); Martin Kretschmer & Friedemann Kawohl, *The History and Philosophy of Copyright*, in MUSIC AND COPYRIGHT 36 (Simon Frith & Lee Marshall Eds., 2004); Tze Ping Lim, *Beyond Copyright: Applying A Radical Idea-Expression Dichotomy to the Ownership of Fictional Characters*, 21 Vand. J. Ent. & Tech. L. 95 (2018); Alexander D. Northover, *"Enough and As Good" in the Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine*, 65 Emory L.J. 1363, (2016); Lior Zemer, *The Making of A New Copyright Lockean*, 29 Harv. J.L. & Pub. Pol'y 891 (2006).

## 2. Philosophical Theories of Copyright Law

### *i. Introduction*

Copyright law is justified and explained by various philosophical theories. This section will analyse three primary philosophical justifications for copyright law within the scope of users' rights. These three theories are: appropriation theories, economic theories, and utilitarian theories. Ultimately, it will aim to show that each theory supports a far more liberal interpretation of users' rights than is currently granted by the law today. This is true particularly with respect to the creation of derivatives. While each theory supports strong copyright protection for the right of reproduction, none of them support an absolute right to make derivatives.

### *ii. Appropriation Theories*

Appropriation theories for copyright law are best described through a quote from Lysander Spooner: “he who does discover or first takes possession of, an idea, thereby becomes its lawful and rightful proprietor; on the same principle that he, who first takes possession of any material production of nature, thereby makes himself its rightful owner.”<sup>4</sup> Thus, these theoretical perspectives are centered on the authorial contributions of a creator as a justification for ownership rights in the creation. This section will analyze two of the more prevalent appropriative theories of copyright law: Lockean and Hegelian philosophies. Both theories are creator-centric, using notions of labor or self-actualization by or of the individual creator to justify protection of her creations. Finding the intersection of users' rights within these theories of legal justification relies on analyzing the impact of derivative uses on concepts of original labor and self-actualization. I find that, from the Lockean perspective,

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<sup>4</sup> Palmer, T.G., *Are Patents and Copyrights Morally Justified? The Philosophy of Copyrights and Ideal Objects*, 13 Harv. J.L. & Pub. Pol'y 817, 823 (1990).

many secondary uses do not violate the justified exploitation of the fruits of the original creator's labor. Moreover, users are entitled to their own right to appropriate from works of intellectual creation that can be considered part of the commons- even where those works are not legally part of the public domain. From the Hegelian perspective, some but not all secondary uses *may* impact the creator's sense of self-actualization through her work but only when those secondary uses are believed to originate from the first creator and, more importantly, when those uses are not paid for. Both perspectives offer far more space for users' rights and derivative creativity than is currently offered by the law.

### **A. Labour Theory: Locke**

Philosopher John Locke is likely the father of modern copyright law<sup>5</sup> and is still regularly cited in modern court opinions.<sup>6</sup> Application of his theories to copyright law often rely on transposition of his remarks on property rights found in Chapter V, "Of Property," from the *Second Treatise of Government*, to intellectual property concepts.<sup>7</sup> However, his *Liberty of the Press*,<sup>8</sup> which specifically addresses intellectual property issues, is of particular value as well. Lockean theory of property is also referred to as "labour theory" and is

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5 Lior Zemer, *The Making of A New Copyright Lockean*, 29 Harv. J.L. & Pub. Pol'y 891, 904 (2006). (Where Zemer draws a comparison between Locke's recommendations for authorial rights to substitute the Licensing of the Press Act.)

6 See: *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-3 (1984) (The Court held: The "general perception of trade secrets as property is consistent with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labor and invention.'") See also: *CCH Can. Ltd. v. Law Soc'y of Upper Can.*, [2004] S.C.R. 339, 15. The Court held:

There are competing views on the meaning of "original" in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. This approach is consistent with the "sweat of the brow" or "industrious-ness" standard of originality which is premised on a natural rights or Lockean theory of "just desserts [sic]," namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be "original" and thus protected by copyright. This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection.

7 John Locke, *Two Treatises of Government*, Second treatise §24-50.

8 John Locke, *Liberty of the Press* (1695), reprinted in *Locke: Political Essays* (Mark Goldie ed. 1997) 329.

founded on the notion that men and women have a property right in the fruits of their own labour. Lior Zemer summarises this perspective as follows:<sup>9</sup>

By mixing his labour with a commonly owned object, the labourer becomes the owner of the object. He has annexed something to it 'more than Nature, the common Mother of all, had done.'<sup>10</sup> Labor justifies the integration of a physical object into the laborer's realm, the *suum*,<sup>11</sup> and the result is ownership.<sup>12</sup>

Locke adamantly advocated that any violation of an individual's property right is an unacceptable and unlawful intrusion.<sup>13</sup> However, while often seen as a creator-centric philosophy with respect to copyright law, Locke placed similar emphasis on protection for the collective.<sup>14</sup> Therefore, "any violation of the collective right by virtue of disproportionate enclosures of cultural and social portions of the public domain violates the public's property right in its labor."<sup>15</sup> In fact, Lockean justifications for copyright law must establish a delicate balance between the rights of the creator and those of users- or what Locke describes as the "commons." Moreover, analyses of Locke's theories indicate that he placed higher interest on the community's wellbeing than that of the individual.<sup>16</sup>

With respect to the balance between individual property rights and those of the common, Locke invoked his principle of "no harm." Lockean philosophy dictates that when a property right is created, the unauthorised use or taking of that property by third parties harms the labourer and should be unlawful.<sup>17</sup> The no-harm proviso tempers rights of a Lockean

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9 Zemer *supra* n.5 at 915-16.

10 Locke, *supra* n.7 at § 45.

11 *Ibid.* at § 28.

12 The *suum* means "what belongs to a person is what is one's own." See Karl Olivecrona, *Appropriation in the State of Nature: Locke on the Origin of Property*, 35(2) J. Hist. Ideas 211, 225 (1974). See also: Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* Pgs. 169-74 (1999).

13 Zemer *supra* n. 5 at 917-18.

14 "For this 'labour' being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to at least where there is enough, and as good left in common for others." Locke *supra* n. 7 at §26.

15 Zemer *supra* n. 5 at 917-18.

16 Marcella Favale., *Death And Resurrection Of Copyright Between Law And Technology*, 23 Information & Communications Technology Law 117, 120 (2014).

17 Zemer *supra* n. 5 at 918.

property owner based on how that ownership affects the collective. The “no harm” proviso also carries with it three conditions. First, the labourer may appropriate only the amount that she is able to use.<sup>18</sup> This is known as the “no-spoilation proviso.”<sup>19</sup> Second, one may appropriate from the common only where there is “enough, and as good left in common for others.”<sup>20</sup> Third, Locke indicates a charity proviso whereby, in extreme circumstances, commoners may take and consume the private resources of others.<sup>21</sup> However, when applying these notions, particularly conditions one and two, to intellectual property instead of tangible property, problems occur. As Hughes observes:

Physical property can be used at any one time by only one person or one coordinated group of people. Ideas can be used simultaneously by everyone. Furthermore, people cannot be excluded from ideas in the way that they can be excluded from physical property. You may prevent someone from publicly using an idea, but preventing the private use of ideas may not be possible. These two basic differences between ideas and physical goods... suggest that ideas fit Locke’s notion of a ‘common’ better than does physical property.... With physical goods, the inexhaustibility condition requires a huge supply. With ideas, the inexhaustibility condition is easily satisfied; each idea can be used by an unlimited number of individuals.<sup>22</sup>

When we look at users as not usurpers of property but rather secondary creators with valid appropriation rights of their own, the Lockean perspective becomes clear. That is to say, this perspective is best applied to users’ rights in two points. First, copyrighted works are works of ownership, but that ownership shall be tempered where communal use is necessary. In a sense, aspects of copyright protection should be communally owned. Second, accepting that copyrighted works represent commonly owned goods within a Lockean understanding, then the addition of labour to copyrighted works is not only permissible but creates separate ownership in the secondary work to be vested in the secondary author. This argument is, in some senses, supported by modern legal frameworks as it underpins modern notions of fair

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18 “Nothing was made by God or Man to spoil or destroy” Locke *supra* n. 7 at §30.

19 Zemer (2006) *supra* n. 5 at Pg. 919

20 Locke, *supra* n. 7 at §27.

21 Zemer (2006) *Supra* n. 5 at 919.

22 Justin Hughes, *The Philosophy of Intellectual Property*, 77 *Georgetown L. J.* 287, 315 (1988).

use and fair dealing- especially those that address works of transformation.<sup>23</sup> However, these assertions must be parsed and boundaries articulated. Otherwise, the smallest changes to a copyrighted work could be interpreted to create new authorship. Yet the current law does not support enough freedoms for users to appropriate works protected by copyright by adding their own labour.

Copyrighted works, while valid pieces of property, remain at least partially in the commons. Some scholars have criticised Locke's philosophy for being too individualistic in nature. They claim that copyrighted works should actually be collectively owned. Zemer provides an excellent outline of these criticisms in his paper, *The Making of a New Copyright Lockean*:

For example, Tom Palmer once noted that if rights are to be recognized in works of art and authorship anywhere, "they should be in the audience, and not in the artist, for it is on the audience that the art work depends for its continued existence, and not on the artist."<sup>24</sup> Rosemary Coombe argues that the creation of cultural commodities is an essential process that involves the collective as much as it involves the individual author.<sup>25</sup> Margaret Chon claims that "the production of a 'work' that is subject to protection by copyright is an activity undertaken by both author and audience."<sup>26</sup> Carys Craig observes that because "the interdependent nature of human culture means that intellectual works are necessarily the products of collective labour" they "ought to be owned collectively."<sup>27</sup> Susan Scafidi remarks that as members of a cultural unit we "already share the same culture and jointly 'own' its cultural products."<sup>28</sup> In other words, these scholars argue that the public's contribution to the creative process amounts to labor.

Consumers, audiences, and users play a distinct role in the creation of value in creative works. Without them, in fact, a work has no value to exploit. This role that cultural consumers play, however, may not amount to labour which would justify a property right under Lockean philosophy. Locke vigorously disapproved of the misappropriation of

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23 In the United States, works considered to be a fair use by transformation are permitted under fair use and given their own copyright protections. See: *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)

24 Tom G. Palmer, *Are Patents and Copyright Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 Harv. J.L. & Pub. Pol'y 817, 848 (1990).

25 Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 Tex. L. Rev. /1853, 1863 (1991).

26 Margaret Chon, *New Wine Bursting From Old Bottles: Collaborative Internet, Art, Joint Works, and Entrepreneurship*, 75 Or. L. Rev. 257, 264 (1996).

27 Carys J. Craig, *Locke, Labor and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 Queen's L.J 1, 36 (2002).

28 Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. Rev. 793, 810 (2001).

another's labour<sup>29</sup> and it is hard to frame the act of appreciating the results of another's labour as a laborious contribution that justifies a property right. Regardless, creative works that become particularly important to certain communities become pieces of their cultural heritage. William Fisher describes seven distinct categories of raw materials with which a Lockean labourer may add his labor:

a. the universe of "facts"; b. languages-the vocabularies and grammars we use to communicate and from which we fashion novel intellectual products; c. our cultural heritage – the set of artifacts (novels, paintings, musical compositions, movies, etc.) that we "share" and that gives our culture meaning and coherence; d. the set of ideas currently apprehended by at least one person but not owned by anyone; e. the set of ideas currently apprehended by at least one person; f. the set of all "reachable" ideas-that is, all ideas that lie within the grasp of people today; [and] g. the set of all "possible ideas" – that is, all ideas that someone might think of.<sup>30</sup>

Cultural heritage is distinctly mentioned. The ability to use existing culture as a starting point for the creation of new works is necessary for a functioning social dialogue through creation. However, copyright law currently impedes this dialogue and interaction with culture by gatekeeping cultural heritage. Where ideas are a limitless resource, it cannot be said that copyright law fails to leave *enough*, in the Lockean sense, for the public to make use of. Yet, within the paradigm of cultural heritage, some ideas and expressions of those ideas are more important than others. Placing legal fences around a society's most important pieces of cultural identity is a violation of the "as good" portion of the no harm proviso regardless of the labour involved in creating them. For example, while there is limitless potential for the creation of stories based in outer space, for the purposes of cultural interaction and dialogue, the ability to build on and use the Star Wars stories is potentially of far more importance to a creator than the ability to create a new story. The Star Wars stories are socially relevant and distinct pieces of modern cultural heritage. Legally restricting derivative authors from building on these stories impedes their ability to add labour to a foundational raw material of

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29 "...he desired the benefit of another's pains, which he had no right to..." Locke *supra* n.7 at §33.

30 Fisher, W., 'Theories of Intellectual Property,' in *New Essays in the Legal and Political Theory of Property* [2001] Stephen R. Munzer ed. Pg. 186.

creation- cultural heritage. However, this behaviour is easily confused with the notion of “free-riding” whereby an author creates a derivative with the sole purpose of profiting off of the established popularity and goodwill of the existing work. Lockean philosophy does not support free-riding and neither should the law. However, a balance can be struck between enabling access and preventing free-riding by using liability rules for derivative rights instead of property rules.

The monopolisation of cultural heritage is theoretically balanced in the law by the public domain- a realm of absolute commons that all creative works eventually fall into. However, cultural dialogue takes place in the present, not the past. Yet, it would be an extreme rarity for anyone to live to see a work created during their lifetime enter the public domain. The lengthy time limits placed on copyright protection ensure this. Therefore, while the public domain does provide a commons of culture, it is not the culture *relevant* for a social dialogue because it is often generations old. It is therefore an inadequate substitute for a functioning commons of culture.

A Lockean creator has the right to claim a property right in the products of her creative labour. However, she may not do so at the expense of the commons. Creative works remain parts of the commons both by virtue of consumer contribution and their designations as cultural heritage. As a result, users should be able to add their own labour to existing creative works as they represent raw materials for the creative process. This philosophy in no way supports direct copying but should limit the power of copyright law to oppose unauthorised derivatives. Wendy Gordon argues that, in terms of Lockean philosophy, attributing an absolute property right to creators is conceptually wrong.<sup>31</sup> Such a right unfairly compresses the entitlement of the public.<sup>32</sup> I agree with both Gordon and Favale in

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31 Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 201 Yale L. J. 1533, 1540 (1993).

32 Favale *supra* n. 16 at 121.

their conclusion that a liability right, not enforceable by injunction, is the most appropriate solution as it would protect the fruits of a creator's labour while allowing access for secondary creativity and thus safeguarding users' rights to the commons.<sup>33</sup>

### **B. Personality Theory: Hegel**

The Hegelian perspective is founded on the idea that "property provides a unique and especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person."<sup>34</sup> Once the ideas are appropriated, the creator's sense of self and well-being are intrinsically tied to the fate of the creation. Thereby comes the rationale for providing individual protection to those creations.<sup>35</sup> While many common law countries such as the United States and the United Kingdom apply mixtures of economic and Lockean justifications for their copyright laws, much of continental Europe applies a more Hegelian, individual-centric, justification to their copyright laws. As such, Hegelian philosophy supports stronger protections for the integrity of a work and its author- known as moral rights that are found in European law but noticeably absent from that of the United States.<sup>36</sup> Despite seeming like a philosophy focused on strongly protecting both authors and their works, Hegelian philosophy supports a liberal system of users' rights under certain circumstances. These circumstances are namely where the integrity or reputation of an author is not harmed by virtue of secondary uses of her works and when those secondary uses are paid for, thereby recognising the property rights of the first author and, by extension, her personhood.

Hegelian philosophy supports secondary uses of creative works where the integrity or reputation of an author is not harmed. Because Hegelian philosophy is based on the intrinsic

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<sup>33</sup> *Ibid.*

<sup>34</sup> Hughes *supra* n. 22 at 330.

<sup>35</sup> Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 Chi.-Kent L. R. 610, 626-29 (1993).

<sup>36</sup> The U.S. has very narrow moral rights protections which are limited only to some forms of visual art. See: 17 U.S.C. §106A

relationship between an author's personhood and her work, it is most often used to justify moral rights in copyright law. These rights are typically expressed as the right to paternity, or the right to claim authorship and be identified as the author of a work, and the right of integrity, or the right to object to any distortion, modification, or derogatory treatment of one's work that would lead to harm of the author's reputation.<sup>37</sup> However, the appropriation of another's work rarely results in reputation harm for the original author. In order for such harm to occur, two factors must be present. First, the secondary use must be distorted or modified in such a derogatory way that the author should feel an attack on her personhood by the use. Second, the secondary use must also present itself as or be reasonably confused to be the work of, or at least condoned by, the original author.

The first factor is subjective and difficult to measure. For instance, J.K. Rowling has stated publicly that she supports fan fiction based on her books except in cases where her characters are used in sexually explicit stories.<sup>38</sup> However, S.L. Armstrong describes her feelings towards all types of fan fiction as such: "My knee-jerk reaction is I wouldn't like it and would want it to go away because those characters would never BE in those situations and I feel it detracts from what my purpose with them is."<sup>39</sup> Moreover, some degrees of harm to one's reputation are already accepted today. For example, most jurisdictions allow for some uses of a work without permission for the purposes of criticism and review. Not all criticisms and reviews will be positive and it is reasonable to believe that the negative ones will negatively impact the reputation of the author under criticism. Defining what constitutes an attack on one's personhood is, at least, difficult and, more likely, impossible. The standard of what an acceptable distortion may be will invariably differ from author to author and any

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37 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)

38 *Rowling Backs Potter Fan Fiction* (News.bbc.co.uk, 2020) <http://news.bbc.co.uk/1/hi/entertainment/3753001.stm>.

39 Armstrong, S. *Fanfiction and Copyright* (2010) <https://slarmstrong.wordpress.com/2010/05/08/fanfiction-and-copyright/>.

legal standard outside of absolute rigidity will leave some authors craving more protection. Yet, such a rigid standard is unnecessary under Hegelian philosophy because, even if the standard were adequately defined, most secondary uses still cannot be said to violate an author's personhood.

The second factor, that the secondary use must also present itself as or be reasonably confused to be the work of, or at least condoned by, the original author, is most important to users' rights, however. Only secondary uses that are falsely presented as the work of the original author, or easily confused as such, may cause harm to that author's reputation and thus her Hegelian personhood. Secondary uses, like original works, represent a form of Hegelian self-actualisation for the secondary author with the same sense of personhood attached to them as original works hold for original authors. Hegel argues "everyone has the right to make his will a thing or to make the thing his will, or, in other words, to supersede the thing and transform it into his own..." indicating that the property right is created by personal attachment- an attachment that may be superseded by another.<sup>40</sup> This line of reasoning appears to be disqualified by Hegel's own statement "a second party cannot take possession of what is already the property of someone else."<sup>41</sup> However, Hegel speaks apparently in reference exclusively to concrete objects ("taking possession of a thing makes its *matter* my property"<sup>42</sup>). Moreover, secondary creativity results in the creation of an entirely new work, one whose existence is the result of the secondary author's personality. Therefore, she does not seek to take possession of an otherwise owned work, but rather the newly-created work which may be viewed as otherwise ownerless. Just as one may take ownership in logs crafted from a day's work of felling trees and another may take ownership in a house they have built from the same logs, artistic creations may serve as building blocks

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40 Hegel, G.W.F., *Elements of the Philosophy of Right*, edited by Wood, A.W., Cambridge University Press, 2003 §44 pg. 76

41 *Ibid.* at §50 pg. 81.

42 *Ibid.* at §52 pg. 82.

for future creations. Moreover, when the secondary creator presents the secondary work as her own, there can be no harm to the reputation of the creator of the original work as she has no attachment to the new work outside of supplying creative raw materials. The crux of this process of transfer and re-appropriation is, however, payment.

Hegelian philosophy supports secondary uses of intellectual property when they are paid for because payment represents a recognition of artistic personhood. Payment to use a work serves as an acknowledgement of an individual's claim over the intellectual property and through such acknowledgement, the content owner is recognised as a person.<sup>43</sup> Hughes cites this notion of "recognition" as an important factor in the self-actualising nature of creative property and argues it must not be mere "lip service."<sup>44</sup> Recognition is manifested through actions, via the treatment of one's property, not by any statement or verbal acknowledgement.<sup>45</sup> To acknowledge the creator of a work as such but then go on to use her work without permission or payment is insufficient for Hegelian recognition. However, the act of payment can serve as such and "purchasers of a copyrighted work or licensees of a patent form a circle of people recognising the creator as a person."<sup>46</sup> Moreover, this income promotes further self-actualisation in that it may facilitate further expression.<sup>47</sup> For an artist, the generation of revenue means the ability to fund more creative endeavours and likewise maximise personality. Thus, personality theory will support users' rights to appropriate works when those uses are paid for.

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43 "Contract presupposes that the contracting parties recognize each other as persons and owners of property..." Ibid. §71 page 103. See also: Hughes (1988) *supra* n. 22 at 349.

44 *Ibid* at 349.

45 *Ibid*.

46 *Ibid*.

47 *Ibid*.

### *iii. Economic Theory*

Copyright law is often justified not only by philosophical theories but economic ones as well. Theoretically, copyright law is used as a tool to correct market imperfections inherent to the economics of the creative industries. There are two characteristics of intellectual property, specifically copyrighted works, that create market imperfections not typically seen with tangible property. First copyrighted works are non-rivalrous.<sup>48</sup> This means that a creative work may be enjoyed an infinite amount of times by an infinite number of people without depleting others of further enjoyment.<sup>49</sup> This affects the competitive nature of intellectual creations as there is little direct competition between works, even in the same medium or genre, as the sales of one will not necessarily deplete the need for another similar work. Second, intellectual creations are non-excludable.<sup>50</sup> This means that it is not always possible to prevent people who have not purchased or paid for the works from accessing and enjoying them.<sup>51</sup> This particular characteristic of expressive works has become exacerbated in the digital environment. This unique characteristic of expressive works not found in physical property or goods facilitates free-riding behaviours- or the use and benefitting from the work without paying for its consumption.<sup>52</sup> This is considered a market failure as it will result in a decrease in the desire to create marketable expressive works due to the difficulty to recuperate investments and profit from those works. Copyright law is designed to correct these market failures by offering creators a bundle of exclusive rights intended to facilitate compensation and thereby promote creativity.<sup>53</sup> This theory is derived from classical economics. However, the more prevailing neoclassical economic theory that governs

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48 Favale (2014) *supra* n. 16 at 125.

49 *Ibid.*

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 See: U.S. Const. Article I, Section 8, cl. 8.

copyright law today can be summarised as such: copyright protection corrects the public-good characteristics of expressive works, by turning them into vendible commodities.”<sup>54</sup> Yet, while copyright law has been able to adequately correct these stated market failures inherent to expressive works for the last three centuries, the age of the internet and digital technologies has rendered the law less capable of doing so. Moreover, while economic theory undeniably supports a strong right of reproduction in copyright law, the evolution of strong derivative rights has come to undermine the notion of encouragement that underpins economic theory and copyright. From a user-centric perspective, this concept is paramount. When looking at the rights of users, the right to make derivative works serves as the greatest barrier to users’ rights of secondary creativity. While an economic theory of copyright justifies strong protections for the author’s rights of reproduction, it cannot be said to justify similar protections for derivative rights because derivatives are typically non-substituting, often have a net-zero or net-positive effect on revenue for the works on which they were based, and represent new additions to the creative economy which overall increase public welfare. Moreover, a system of strong protection for derivative rights arguably supports *underproduction* of creative works.

Economic theory supports expansion of users’ rights to make derivatives because derivatives are non-substituting and typically have positive or no economic effect on their original counterparts. From an economic perspective, creative works are inherently non-substituting for one another. However, this is premised by the notion that any two creative works are at least different enough from each other to provide unique enjoyment to the same audience. As a result, pirated works and other facsimiles are obviously substitutive as they offer the same experience to the same audience. Derivatives, however, appeal to similar or the same audiences as the original works that they build upon without siphoning revenue

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54 Favale *supra* n. 16 at 125.

from them. In terms of economic effects on the originals they build upon, derivatives typically bolster sales of the works they adapt by raising or reawakening public awareness and interest in them.<sup>55</sup> Much of the data on this comes from authorised derivatives. However, unauthorised derivatives would likely have similar effects.

The economic justification for copyright can also be described as an encouragement theory in that it is designed to encourage the production of creative works through economic incentives. The economic justification for copyright law is based on four premises. First, a growing body of creative works are necessary for social wealth. Second, without protection, the cost of creative works would diminish to a value marginally higher than the cost of making a copy of those works and, in the digital world, this value is often functionally zero. Third, without the ability to profit from their creative works, creators will stop creating altogether- or at least at a rate that would significantly diminish the output of creative works and likewise social wealth. Fourth, copyright protection counteracts this market failure by ensuring financial exploitation of creative works for a period of time and thereby incentivises production of new works. Premise one is easy enough to accept and a philosophical discussion about the value of art in society is outside the scope of this paper. Premise two is also easy to accept as it is factually true. However, premises three and four are less certain. First, can we be certain that without copyright protections we would see such a significant decrease in creative output? Are financial motivations significant enough in the creative process for this to be true? The answer will vary depending on the creative sector. There are thousands of musicians in New Orleans alone playing gigs for tiny audiences and recording

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<sup>55</sup> *Confirmed: Radiohead Landed On Charts Because Of Remix Tracks (Updated)* (WIRED, 2020)

<https://www.wired.com/2008/04/confirmed-radio/> (showing how Radiohead made the top 100 because of remixes); *See also:*

*"Old Town Road" Just Became Billboard's Longest-Running No. 1 Ever* (Vox, 2020) <https://www.vox.com/culture/2019/7/29/8937934/lil-nas-x-old-town-road-billboard-charts-record-breaking-single> (explaining how remixes of old town road kept interest piqued)

*See also:* Knight, M., *The World of Fan Fiction: Where Creative Expression and Copyright Collide* (Articles.ibpa-online.org, 2017)

<https://articles.ibpa-online.org/article/the-world-of-fan-fiction-where-creative-expression-and-copyright-collide/> (IBPA article telling authors to encourage their fans to write and publish fan fiction based on their works because it can boost sales.)

albums that may only be heard by a handful of people. It is hard to believe that these creators, who are more than likely losing money by making their music, would stop creating if there were no laws protecting the financial integrity of their creations. However, it is also equally hard to believe that Disney would have invested the 356 million dollars it took to make the most recent Avengers film<sup>56</sup> without the ensured protections offered by copyright law. It is therefore likely that, without *any* sort of copyright protections, the creative industry would not die altogether but would look vastly different than it does currently. However, the fourth premise is most important for understanding economic theory and the rights of users. Does copyright law actually incentivise production of *new* works? A look at the creative landscape of popular culture today indicates that perhaps it does not. In fact, if anything, copyright law seems to incentivise the financial exploitation of *existing* works over the creation of new ones. Instead of seeing an incentive to create new works, we are seeing the creative industries using copyright powers to release the same creative content over and over until it is no longer economically viable. We are living in the age of the sequel and reboot. Under the current copyright system, we do not have a healthy economy of creative works. Instead, we have an oligopoly of content owners selling us new or slightly different iterations of the same stories over and over again. The potentially enormous value of a copyright coupled with its finite time period does not incentivise the creation of *new* works but rather the exploitation of existing popular ones.

This problem is reminiscent of the “chicken and egg” paradox. On one side, the power of a valuable copyright incentivises content owners to reinvest in existing works until they are no longer economically valuable- a deterrent to *new* creation. However, theoretically, this power likewise promotes the creation of new works by virtue of their potential economic

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<sup>56</sup> Production costs and global box office revenue of selected Marvel Comics movies from 2002 to 2021, Statista, <https://www.statista.com/statistics/323886/marvel-comics-films-production-costs-box-office-revenue/>

value in the future and for years to come. The incentive theory, in this way, functions much like a lottery ticket. The potential for massive wealth encourages people to buy a ticket. However, it is hard to imagine someone continuing to purchase new lottery tickets after winning a life-changing jackpot- not even necessarily out of complacency but more so because there are plenty of more secure ways than buying lottery tickets to continue to accumulate wealth if you have a massive fortune at your disposal. This analogy admittedly does not accommodate for the idea that there are millions of creators who create out of passion- not the potential for wealth. However, the fact that popular culture is dominated by creative corporations is likewise inarguable. Disney built a creative empire on the back of a handful of great stories. Now, it seems more interested in milking those stories dry while their copyrights are still valid than investing in new ones.<sup>57</sup>

Limiting derivative rights in a way that opens access for third parties to easily make them would transfer the majority of the economic value of a copyright into the right of reproduction, or the actual work itself. This is not necessarily a bad thing. While derivatives are a viable market and revenue stream for a copyright, they are far from the *only* one and potentially outside the scope of copyright protection anyway. While copyright law explicitly does not protect ideas, derivative rights functionally do. They protect an infinite amount of yet-to-be-expressed ideas with respect to an existing expression. For example, the copyright for *Harry Potter and the Sorcerer's Stone*, book one in the series, not only protected the author, J.K. Rowling, from unauthorised reproductions of the novel, but also gave her the sole power to write or authorise the writing of the 6 ensuing sequels, the theatrical play, and the two *Crimes of Grindlewald* spin-off films. These creative works were protected by virtue of derivative rights before they were ever conceived.

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<sup>57</sup> Economic data shows that Disney has made over \$7 billion by remaking their old animated films into live action movies since 2010. *Disney Remakes Have Made Over \$7 Billion Since 2010 (The Independent, 2020)* <https://www.independent.co.uk/arts-entertainment/films/news/disney-remake-box-office-gross-total-lion-king-a9028641.html>.

Ultimately, economic theory supports strong rights of reproduction because they are necessary to correct the market failures inherent to creative works. However, such market failures are not nearly as present with derivatives. The derivative right may be tempered under economic theory as long as free-riding is prevented. This can easily be achieved in a multitude of ways. Using compulsory licenses to limit the derivative right protects against free-riding because uses, while no longer requiring permission, will still require payment. Moreover, the right to exclude others from making derivatives may be allowed only in cases lacking an established standard of additional creativity. Finally, the law governing a compulsory license in this area could be tailored so narrowly as to limit the scope of allowed derivations significantly, such as by continuing to treat sufficiently delineated characters as protected by the right of reproduction. Under such a regime, the story of the life of Obi-Wan Kenobi would be protected for Disney alone to exploit, but original stories taking place in the Star Wars universe, even those potentially making use of obscure characters, would be allowed.<sup>58</sup> This paper is not the place to discuss which of these options has the most merit or would be most effective, but the point is that there are options for altering the derivative rights inherent in copyright law- even from an economic theory perspective.

#### *iv. Utilitarian Theory*

Founded by philosopher, Jeremy Bentham, utilitarian philosophy is a formulaic approach to ethical questions that analyses the perceived effect of an action in terms of the happiness or pleasure it will create for a given number of people compared against the

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<sup>58</sup> See *Paramount Pictures Corp. v. Axanar Productions Inc.* WL 83506 (C.D. Cal. Jan. 3, 2017) for a real-life example of this same concept, where Axanar raised money to produce an original story based on an obscure character from Star Trek that took place in the Star Trek universe. The case was settled with the public terms of the agreement reflecting CBS's fan films policy which drastically altered the course of the proposed film.

suffering it would reciprocally create for a given number of people. Bentham defines utility as:

that principle which approves or disapproves of every action whatsoever, according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.<sup>59</sup>

Under Benthamian Utilitarianism, all are equal and happiness and pain are measured on quantitative not qualitative scales; the happiness or suffering of one individual bears the same weight as that of another.<sup>60</sup> The appropriate solution to any moral or ethical dilemma is, therefore, whichever one leads to the least amount of suffering for the least amount of individuals- or conversely, the greatest pleasure for the greatest number of individuals.<sup>61</sup>

While early copyright laws were largely utilitarian constructs,<sup>62</sup> centuries of legal evolution influenced by individualism has lead to a system of laws that no longer reflect utilitarian values. Sara Stadler writes in reference to American copyright law:

As a nation, we began with Bentham; but we have ended up with John Locke, and as a result, we find ourselves strangled by the very monopolies about which the Framers repeatedly warned in their public writings.<sup>63</sup>

A truly utilitarian copyright law would likely serve to promote social welfare by advancement of arts, sciences, and thereby learning. However, it would also reject the strong monopoly protections that often benefit individuals over society that have come to define the modern legal framework. Utilitarian philosophy supports liberal users' rights that must be carefully balanced against the minimum individualist protections necessary to promote creation.

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59 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, [1907, reprint of 1823 edition] Oxford Clarendon Press, available at <[https://www.econlib.org/library/Bentham/bnthPML.html?chapter\\_num=2#book-reader](https://www.econlib.org/library/Bentham/bnthPML.html?chapter_num=2#book-reader)> Chapter 1, §II.

60 *Ibid.* Chapter 4 §V. See also: Oren Gorecki, *Utilitarianism: Doctrinal Analysis Evolution of Thought*, Vol. 20, No. 5, Special Issue, *Annales. Ethics in Economic Life*. 141, 143 (2017). doi: <http://dx.doi.org/10.18778/1899-2226.20.5.11>

61 Bentham (1907) *supra* n. 5959 at Chapter 4, §V.

62 Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 *Iowa L. Rev.* 609, 611 (2006).

63 *Ibid.*

Applying the utilitarian formula to the question of copyright law protection leads to, perhaps, an answer inappropriately skewed in favour of users. Here, there are multiple forms of happiness that factor into the equation. First, there is the intrinsic happiness of creators—their right to create without restriction.<sup>64</sup> A secondary aspect of this happiness is the right to preserve the integrity of their creations.<sup>65</sup> Second, there is the happiness of users and consumers. This encompasses both their ability to access creative works<sup>66</sup> and utilise them in the creation of secondary works.<sup>67</sup> Though the lines between user-creators and consumers have become more blurred, there are surely still far more consumers of creative works than there are creators. Therefore, a purely utilitarian construct would favour the overall happiness of this larger group of individuals and would open access to works for creative consumption. This, at first glance, seems to indicate that the most utilitarian copyright law would be *no* copyright law. However, with *no* protections in place at all, the output and quality of creative works would surely decrease and thereby diminish the happiness of the larger body of creative consumers. Moreover, later utilitarian philosophers noted that rigid application of the formula can lead to a tyrannical majority which imposes its will despite violating the rights of the minority individuals.<sup>68</sup> Thus, a balance must be struck where the minimum amount of protections are offered to ensure the maximum output and quality of creative works and protect intrinsic rights of first creators, but still allow easy access to both consume and adapt those works for users and consumers. The logical response to this statement is something along the lines of: “is that not what we have now?” I previously discussed my thoughts on how the current law supports underproduction of creative works and the continued

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64 “The pleasures of skill.” Bentham (1907) *supra* n. 59 at Chapter 5, §V.3

65 “The pleasures of a good name.” *Ibid.* at Chapter 5, §VII.5

66 “The pleasures dependent on association.” *Ibid.* at Chapter 5, §XV.13

67 “The pleasures of skill.” *Ibid.* at Chapter 5, §V.3

68 Gorecki *supra* n. 60 at 147.

pervasiveness of piracy and various forms of unauthorised remixes<sup>69</sup> indicate that the larger body of users and consumers are both unhappy with their ability to access and re-use creative works. The law we have now is *not* the utilitarian answer to copyright protection.

A more appropriate utilitarian answer for what copyright should look like is absolute protection for the right of reproduction (defence against unauthorised copies, fakes, and forgeries) coupled with a system of derivative rights governed by liability rules. The strict right of reproduction ensures commercial viability and ethical preservation of a copyrighted work and thus promotes creation. It protects the rights of the creative minority to ensure their happiness and stimulate creation. As consumer access will remain the same, piracy will surely continue but may be economically offset in other ways such as levies. Using liability rules to govern derivative works appeases both the user's desire for access to creative raw materials in the form of existing works and the content owner's desire to profit from her works. Liability rules create revenue streams for the content owner without unduly burdening the derivative creator with upfront payments for access. While such action would serve to diminish the overall economic value of a copyright by virtue of standardising the value of a derivative right- which for some works may be valued in the billions in the current economic market-<sup>70</sup> this decrease in the individual value of some works is offset by both the economic and social value of new creations able to enter the market. Moreover, this solves the dilemma I discussed earlier of an overprotecting copyright system that encourages creative underproduction once a creator owns a popular copyright. In reducing the derivative value of copyrights, this system encourages the continued production of entirely new works as they would have the strongest protections and therefore the highest potential economic value. This

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69 This refers to remix in its broadest sense, encompassing traditional remixes of musical compositions and sound recordings as well as fan fiction, memes, video and musical mash ups, modded video games, machinima, etc.

70 In 2012, Disney announced its purchase of Lucasfilm for \$4.05 billion. While the sale included all aspects of the Lucasfilm business, a large portion of the valuation came from the derivative rights to the Star Wars and Indiana Jones stories and characters.

system looks first to the wants and needs of the majority population, but not in a way that tramples the rights of the minority. It is the ideal utilitarian compromise that offers something to everyone.

### **3. The Disenfranchisement of the Common Creator**

Up to this point, this paper has discussed the main theories underpinning modern copyright law. These justifications, however, upon close inspection, do not actually *justify* the imbalanced system of rights we have in place today. Philosophical ethics have been pushed to the wayside in favour of corporate lobbying and capitalist individualism. The balance of rights between users and creators under the current system inarguably favours creators by a gross margin. Yet each of the theories discussed up to this point that have been in some way used to justify the modern system we have support a liberal balance of rights between the two groups. We have, however, allowed the law's evolution to be dictated by corporate lobbyists and, as such, we are left with a legal regime that systematically favours the increasingly fewer corporations that control the vast majority of the most valuable copyrights. This essay is neither an advocacy of creative anarchy nor a Marxist manifesto of creative protection. There should be protections in place for creative works and, in some aspects, those protections should be strong. However, the fundamental purpose of copyright law should always be the *promotion* of creative works and, in its current state, it is no longer doing so. The paradigm of creators versus users versus consumers has shifted and the rules designed for this trichotomy in the 18th, 19th, and even 20th centuries can no longer be applied.

The law has become something that neither functions adequately nor represents something we should not want even if it did. Overprotection in copyright is a symptom of the same individualist philosophies that have lead to huge wealth disparities in countries like the United States. It is a legal blind eye to the wants and needs of common people at the behest of

corporate giants. The facilitation of a healthy creative economy relies on addressing the needs of all parties- not just those with the highest profits. There is an imbalance in the current standards of protection that grossly favours content owners. This imbalance is characterised by the extensions of copyright terms over the course of the last century coupled with increased protectionist treatment of secondary uses online and the functional lack of access to proper licensing mechanisms for average users.

### *i. Extension of copyright terms*

There is a stark reason as to why the notion of the public domain is commonly associated primarily with very old works. This is because, since its inception, the terms granted by copyright law have undergone multiple extensions that, at some stages, were designed by corporate content owners to perpetuate protection of modern works. The last of these extensions is largely the product of a miniature trade battle between the European Union and the United States coupled with the double edged sword of American legislative susceptibility to corporate influence and its global economic power to influence other nations to follow suit. This section will chart the evolution of copyright term extensions in American law as well as the ensuing international accommodations.

The first copyright law in the United States was passed by Congress in 1790 and provided a total of twenty-eight years (a once-renewable fourteen-year term) of protection for maps, charts, and books.<sup>71</sup> Since then, Congress extended the term of protection four times. In 1831, the initial fourteen-year term of protection was extended to twenty-eight years but Congress kept the renewal term at the original fourteen.<sup>72</sup> In 1909, the renewal term was also extended to twenty-eight years.<sup>73</sup> In 1976, Congress extended the term of protection to

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

72 Act of Feb. 3, 1831, ch. 16, § 4 Stat. 436 (repealed 1870)

73 Act of Mar. 4, 1909, ch. 320, § 35 Stat. 1075 (repealed 1976)

seventy-five years (an addition of 19 years).<sup>74</sup> This act did not apply retroactively. Therefore, all works published in 1923 or later received the benefits of this extension but those published prior to 1923 remained in the public domain. The oldest of these works, those published in 1923, were slated to enter the public domain in 1998 under this new law. However, in 1998 Congress passed the Sonny Bono Copyright Term Extension Act (“CTEA”) which added an additional twenty years of copyright protection to all existing works under protection.<sup>75</sup> The CTEA stated that works created between 1923 and 1978 would now receive protection for a total of ninety-five years and any work created after 1978 would receive a term of the life of its author plus seventy years.<sup>76</sup> Anonymous, pseudonymous, and works for hire would also receive a ninety-five year term of protection.<sup>77</sup>

To give an example, at its publication, H.P. Lovecraft’s *The Lurking Fear* would have been slated to enter the public domain in 1989 as it was first published in 1923 and subject to the 1909 Act granting 56 total years of protection. However, its term was extended in 1976 and the new law meant that the novel would not enter the public domain until 1998. Its release to the public domain was then *again* blocked by the CTEA in 1998 which extended its term of protection to 2018- 39 years after it was originally intended to enter the public domain.

Among these amendments to the legal term of a copyright, the CTEA has received the most criticism from legal scholars for both its blatant pandering to corporate lobbyists and its lack of constitutional justification. It was, however, largely a response to the European Union’s copyright directive designed to harmonise its copyright laws in 1993.<sup>78</sup>

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74 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541

75 Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998)

76 17 U.S.C. §§ 302-304 (2011).

77 *Ibid.*

78 Directive on Harmonizing the Term of Protection of Copyright and Certain Related Rights, Council Directive 93/98, 1993 O.J. L 290/19

The EU Directive achieved two goals. First, it harmonised the length of copyright terms among its member states, requiring each member state to adopt a term of life plus seventy years by 1995.<sup>79</sup> Second, it set out to increase European economic leverage in global creative markets by requiring member states to adopt the “rule of the shorter term” when dealing with foreign works.<sup>80</sup> The “rule of the shorter term” is a provision set out in the Berne Convention<sup>81</sup> that dictates when there is a disparity in term of copyright protection between two nations, the nation with the longer term may choose to shorten the term of protection to match that of the other nation with regard to works originating from it.<sup>82</sup> For example, if France offers a term of life plus seventy years and the United States offers a term of life plus fifty years, when applying protection to American works in France, France may choose to apply the shorter, life plus fifty, term instead of its own more generous life plus seventy. This is because French works in the United States will only receive the life plus fifty protection and is designed to allow nations to match the economic imbalance. Under the Berne Convention, the rule of the shorter term is permissive. However, under the EU Directive, it became compulsory for EU member states. This was a calculated move to increase Europe’s trade leverage against the United States with regard to creative works. In the debate over its response to the European Law, the United States estimated that the disparity in protection would cost its film industry alone as much as \$200 million a year by the year 2020.<sup>83</sup> Thus, Europe’s move sparked the debate in the United States Congress to extend its own terms so

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<sup>79</sup> *Ibid.* at Article 7

<sup>80</sup> *Ibid.* at Article 7(1)

<sup>81</sup> Berne Convention *supra* n. 37

<sup>82</sup> *Ibid.* at Article. 7(8).

<sup>83</sup> Shauna C. Bryce, *Life Plus Seventy: The Extension of Copyright Terms in the European Union and Proposed Legislation in the United States*, 37 *Harv Int’l L J* 525, 528 (1996). Citing: Hearings Before the House of Representatives Subcomm on Courts and Intellectual Property of the Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (statement of Ambassador Charlene Barshefsky, Deputy U.S. Trade Representative).

that it would be able to maintain its favourable trade imbalance in creative works with Europe.

However, regardless of the perceived necessity to maintain competitive viability of United States' copyright works abroad, the CTEA was also the product of intense lobbying from the creative industries.<sup>84</sup> Disney, who was slated to lose protection for its iconic cash-cow, Mickey Mouse, was particularly involved in the legislative process for the CTEA. Eighteen of the twenty-five sponsors for the bill received campaign money from Disney, including Senate Majority leader, Trent Lott, on the very day he signed up as a co-sponsor.<sup>85</sup> Congress's failure to address potential issues of the new law, such as the fact that term extensions were arguably a hidden tax on consumers or its conflict with the constitutional mandate that copyright laws should "promote the Progress of Science,"<sup>86</sup> suggest that the CTEA's swift passage through congress was a reflection of the power of corporate money in the American legislative process.

Ultimately, life plus 70 has become nearly a global standard with over 80 nations offering protection of at least this term and the vast majority of the rest offering at least life plus 50 years.<sup>87</sup> However, just over 100 years ago when the United States was considering its second copyright term extension, Congress rejected the term of life plus fifty years because it

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84 See: Keith Pocaro, *Private Ordering and Orphan Works: Our Least Worst Hope?* 15 Duke L. and Tech. Rev. 1,15 ("The current state of copyright law, with wildly longer term limits and automatic protection, is a result of continuous content-industry lobbying to protect their valuable, ageing intellectual property.")

85 See: Christopher Buccafusco, and Paul Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 Berkeley Tech. L. J. 1, 8 (2013) Citing: Landes, W.M. and Posner, R., *The Political Economy of Intellectual Property Law* [2004] AEI-Brookings Joing Center for Regulatory Studies, pg. 16 (noting that the Center for Responsive Politics showed that in 1996 media interests donated \$1.5 million to six of the sponsors of the Copyright Term Extension Act); See also: Solomon, J., 'Rhapsody in Green', BostonGlobe, Jan. 3,1999, at E2. John Solomon wrote:

"Behind the scenes, however, [Disney] has been active. Congressional Quarterly reported that Disney chairman Michael Eisner personally lobbied Senate Majority' Leader Trent Lott, a Republican from Mississippi. That day, according to the Center for Responsive Politics, Disney gave Lott a \$1,000 contribution, following up two weeks later with a \$20,000 donation to the National Republican Senatorial Committee."

86 U.S. Const. art 1§8, cl. 8. (The CTEA was later challenged on the grounds that extending the terms of existing works failed to promote the creation of new ones as per this mandate in *Eldrid v. Ashcroft* 537 U.S. 186 (2003).)

87 *List Of Countries' Copyright Lengths* (En.wikipedia.org, 2020) [https://en.wikipedia.org/wiki/List\\_of\\_countries%27\\_copyright\\_lengths](https://en.wikipedia.org/wiki/List_of_countries%27_copyright_lengths)

believed that such a length was a radical departure from what was then the scope of copyright law.<sup>88</sup> Yet many of the nations with lengthy copyright terms of protection, including Australia,<sup>89</sup> Japan,<sup>90</sup> Jamaica,<sup>91</sup> South Africa,<sup>92</sup> were directly influenced by the United States.

The extension of copyright terms across the globe has directly contributed to the imbalance of rights between users and content owners. Copyright law is designed to create temporary monopoly rights in order to incentivise creation. However, those monopoly rights are balanced by various safety valves, among which is the public domain- a legal space of unrestricted use into which every work eventually enters. Yet the last century has been marked by so many extensions to copyright terms that one may wonder if legislators will *ever* allow modern works to enter into the public domain. Even if we truly have reached a place where lawmakers are content with the terms set, we have still gone too far considering the time extensions have not been met with equivalent expansions for users' rights. If anything, in the aftermath of term extensions, the last decade might be described as a period of legal attack on users' rights, constricting them even more and thus furthering the imbalance. The following sections analyse how these constrictions of users' rights have taken shape, namely through increased protectionist treatment with regard to secondary uses and a lack of access to proper licensing mechanisms.

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88 Bryce *supra* n. 83 at 530. Citing: Hearings Before the House of Representatives Subcommn on Courts and Intellectual Property of the Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (statement of Marybeth Peters).

89 See: Rimmer, M., *Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement*, (2006), 11 First Monday, No. 3 <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1316/1236> ("In the trade negotiations, [the U.S. Trade Representative] demanded that Australia ratify the World Intellectual Property Organization (WIPO) Copyright Treaty and Performances and Phonograms Treaty. He supported an extension of the copyright term, so that Australia adopted the standards set by the Sonny Bono Copyright Term Extension Act.") (emphasis removed); see also Sainsbury, M., *Governance and the Process of Law Reform: The Copyright Term Extension in Australia*, (2006) 9 Canberra Law Review 1. (detailing lobbying effort in Australia to ratify the Free Trade Agreement).

90 See Masnick M, *Copyright Extension Moves To Japan* (*Techdirt.*, 2020) <<http://www.techdirt.com/articles/20091119/1840217016.shtml>.

91 See Masnick, M, 'Jamaica Latest to Embrace Retroactive Copyright Term Extension,' (*Techdirt.com*, 2020)

<http://www.techdirt.com/articles/20111014/00471816347/jamaica-latest-to-embrace-retroactive-copyright-term-extension-screw-public-domain.shtml>

92 See Rens, A. & Lessig, L., *Forever Minus A Day: A Consideration of Copyright Term Extension in South Africa*, 7 South African J. of Info. & Comm., 22 (2006).

## ***ii. Increased protectionist treatment of secondary uses***

Alongside the seemingly perpetual extensions of copyright terms in the modern world, the enforcement issues associated with the internet have brought about new standards in copyright protection which serve to undermine users' rights. The notice and takedown system, technical protection measures ("TPMs"), and content filtering software are the primary means of enforcing copyrights in the digital environment and each serves to whittle away at users' rights for secondary creation. Generally, the notice and takedown system, TPMs, and filtering software are all used online to prevent or remove infringing content at the expense of often removing legitimate secondary uses and even licensed uses with little recourse granted to the legitimate secondary authors.<sup>93</sup> The nets designed to catch infringements are cast widely with little care for the rights of authors whose legitimate works are caught in them. These legal mechanisms are also subject to various abuses and used as tools of censorship<sup>94</sup> and extortion<sup>95</sup> with little repercussion for doing so. The use of technology and automation to enforce copyright more efficiently in the digital space has resulted in an inadvertent shrinking of users' rights in a time where we should be looking to expand them to balance the concurrent expansions of owners' rights seen through term limit expansions.

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93 Mitchell Longan, *Big Brother is Watching but He Doesn't Understand: Why Forced Filtering Technology isn't the Solution to the Modern Copyright Dilemma*, (2018, August 17) Script'ed Journal of Law Technology and Science. Peer-Reviewed Blog. <https://script-ed.org/blog/big-brother-is-watching-but-he-doesnt-understand-why-forced-filtering-technology-on-the-internet-isnt-the-solution-to-the-modern-copyright-dilemma/>.

94 Ehrenkranz, M., *Producers of Nazi Romance Movie Appear to Be Using DMCA Takedowns to Silence Critics* (Gizmodo, 2019) <https://gizmodo.com/producers-of-nazi-romance-movie-appear-to-be-using-dmca-1831555053> (Where producers of a Nazi romance film used the notice and takedown system to silence critics). *See also: Video Game Developer Says He Won't Send a Takedown of a Bad Review, Does So Anyway* (EFF, 2019 <<https://www.eff.org/takedowns/video-game-developer-says-he-wont-send-takedown-bad-review-does-so-anyway>> (Where a video game developer uses notice and takedown to remove bad reviews.)

95 Hale, J., *Here's How A Scammer Abused YouTube's Copyright Infringement System In An Attempt To Extort Money From Users* (Tubefilter, 2019) <https://www.tubefilter.com/2019/02/07/youtube-content-id-copyright-infringement-scam/>.

## A. Notice and Takedown

The Digital Millennium Copyright Act (DMCA) was designed to bring copyright law into the age of the internet. It was passed in part to incorporate the World Intellectual Property Organisation's Copyright Treaty of 1996 into U.S. law.<sup>96</sup> The act, among other things, had the goal of creating a more efficient system of copyright enforcement on the internet. The primary mechanism used to achieve this goal is the, now widely used, system of notice and takedown. This is a process whereby rights holders may work with online service providers- or those who host websites that allow their users to post material autonomously- to remove infringing material posted by their users. A similar system was also passed in the European Union's Electronic Commerce Directive of 2000.<sup>97</sup>

The notice and takedown process allows rights holders to request that infringing material be removed when posted to one of these sites and allows the online service providers immunity from claims of secondary infringement as long as they adhere to the rules of the process. Without this safe-harbour provision, sites like YouTube, Google, Facebook, and Reddit could never exist. The system attempts to balance users' rights against those of rights holders while simultaneously granting private entities the right to self-police in hopes that doing so would ease the burden of the courts. However, the system has its issues in practice.

The inefficacy of the notice and takedown system has been tracked through a multitude of empirical studies over the last two decades. In 2004, the Liberty Project compared reactions of a U.S.-based ISP to those of a U.K. (E.U.) based ISP to takedown

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96 Jeffrey Cobia, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 Minn. J.L. Sci. & Tech. 387, 388 (2008)

97 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') *OJ L 178, 17.7.2000*

requests sent for obviously out-of-copyright content.<sup>98</sup> The group found that the U.S. ISP refused to remove the allegedly infringing material without the complaint specifically adhering to requirements set out by the DMCA, compared to the European ISP who immediately removed the harmless material without any further vetting of its validity.<sup>99</sup> In 2006, Urban and Quilter analysed 876 takedown notices, the vast majority of which were issued to Google (734).<sup>100</sup> In analysing Urban and Quilter's findings, Mostert and Schwimmer claimed that 9 percent of the notices were defective, 30 percent presented questions that should have been determined by a court of law, and 57 percent of the notices were filed against competitors.<sup>101</sup> In 2014, the Multatuli project conducted a similar investigation into 10 Dutch ISPs.<sup>102</sup> The project again dealt with posting of obviously out-of-copyright material on websites hosted by these ISPs, calling for its removal and analysing their reactions.<sup>103</sup> Of the 10 tested, seven removed the harmless material without questioning the complaint's validity, one completely ignored the complaint, and two refused to remove the content because the complainant's identity could not be verified.<sup>104</sup> The researchers concluded '[i]t only takes a Hotmail account to bring a website down, and freedom of speech stands no chance in front of the cowboy-style private ISP justice.'<sup>105</sup> In 2017, Urban and Schofield published findings resulting from three empirical studies of the notice and takedown system.<sup>106</sup> The second study described in this paper quantitatively analysed a

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98 Christian Ahlert, Chris Marsden, and Chester Yung, *How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation* (2004) <http://pcmplp.socleg.ox.ac.uk/research/archived-projects/liberty/>

99 *Ibid.*

100 Jennifer M. Urban, and Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices under Section 512 of the Digital Millennium Copyright Act*, 22 Santa Clara Computer & High Tech. L.J. 621 (2006) ('Urban-Quilter study')

101 Frederick W. Mostert and Martin B. Schwimmer, *Notice and Takedown for Trademarks*, 101 TMR 249, 259-60 (2011)

102 Sjoera Nas, *The Multatuli Project ISP Notice & Take Down*, SANE (27 October 2004) <https://www-old.bof.nl/docs/researchpaperSANE.pdf> ('Multatuli project').

103 *Ibid.*

104 *Ibid.* at 'The Results'

105 *Ibid.* at 'Conclusion'

106 Urban, J. M., Karaganis, J., and Schofield, B., *Notice and Takedown in Everyday Practice* (March 22, 2017) UC Berkeley Public Law Research Paper No. 2755628, Available at SSRN: <https://ssrn.com/abstract=2755628> or <http://dx.doi.org/10.2139/ssrn.2755628>

sample of 1800 takedown requests out of 108 million provided by Lumen from a 6 month period in 2013.<sup>107</sup> Key findings were: 98.9% of the takedown requests were automated;<sup>108</sup> in one in twenty-five requests the allegedly infringing work described did not match the allegedly infringing material;<sup>109</sup> in 13.3% of requests it was difficult to locate the allegedly infringing material;<sup>110</sup> and 1 in 15 requests were flagged with characteristics that weighed favourably towards fair use;<sup>111</sup> and overall, nearly one third of the requests presented serious questions about their validity.<sup>112</sup>

The notice and takedown system is the first of many copyright enforcement mechanisms that have sought to delegate copyright adjudication to the private sector in hopes of an increase in legal efficiency. As with other areas of copyright law where we see the private sector allowed to self-regulate, the practice of copyright adjudication under the notice and takedown system has become an unbalanced system that favours rights holders at the expense of users' rights. This imbalance takes shape through various abuses of the system that are, by nature, unpreventable coupled with an insufficient system of counter-notices.

### **Abuse of the Notice and Takedown System**

The premier flaw of the notice and takedown system is its lack of functional legal oversight. While it is a legal mechanism of copyright law enforcement, the vast majority of its processes take place without supervision by any governmental body. The system was designed this way in order to alleviate the burden placed on the courts by allowing the private sector to self-police in a more efficient way. However, this lack of oversight has led to abuse

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107 *Ibid.* at 77-79

108 *Ibid.* at 82

109 *Ibid.* at 90

110 *Ibid.* at 94

111 *Ibid.* at 95

112 *Ibid.* at 96

of the system as there are virtually no repercussions for doing so. Moreover, the United States' requirement that service providers expeditiously remove infringing content once given notice has led to a tendency to err on the side of removal instead of performing an in-depth analysis of the legitimacy of each claim received. The consequences for failure to remove an actual infringement are steep- the potential loss of safe harbour protections and assumption of secondary liability for the infringement. However, there is no functional penalty for removing legitimate content. Therefore, the very design of the system lends itself to be open for abuse by content owners and those posing as content owners. There are three particular ways in which this abuse has manifested.

First, takedown notices can be sent by those who are not actually the legal owner of the rights for the copyrighted material in question. This includes anticompetitive takedown notices filed to remove competing businesses links from Google search results,<sup>113</sup> online thieves using the system to essentially hold users' YouTube accounts hostage,<sup>114</sup> and notices filed by trolls simply looking to cause mayhem.<sup>115</sup> Timothy Geigner, writing for Techdirt, aptly wrote that "good internet policy is not that which can be easily subverted by impersonating another person, because *that happens all the time* on the internet."<sup>116</sup> Moreover, if theoretically anyone can assert rights of control over a copyrighted work then it is not actually being controlled or protected. The simplicity of the notice and takedown system is supposed to be its strength. However, it must provide some way of verifying the

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113 Binder, M., *Fraudsters Are Abusing Google With Fake Copyright Complaints, And It's Getting Worse* (Mashable, 2020) <https://mashable.com/article/google-fake-dmca-takedown-requests/?europa=true>.

114 *Here's How A Scammer Abused Youtube's Copyright Infringement System In An Attempt To Extort Money From Users* (Tubefilter, 2020) <https://www.tubefilter.com/2019/02/07/youtube-content-id-copyright-infringement-scam/>.

115 *Soundcloud Troll Getting DMCA Takedowns Shows The Weakness Of Notice And Takedown Systems* (Techdirt., 2020) <https://www.techdirt.com/articles/20181116/09175541064/soundcloud-troll-getting-dmca-takedowns-shows-weakness-notice-takedown-systems.shtml>.

116 *Ibid.*

legitimacy of those filing takedown requests and/or a system of recourse against those who file false claims. Otherwise, it will continue to be abused at the expense of legitimate users.

Second, the process may be used for the purpose of intentionally censoring free speech. Examples of this sort of abuse of the system are: the producers of a Nazi romance movie to silence critics,<sup>117</sup> by a major American television network to silence a news article about leaked shows along with subsequent social media posts referring to this censorship,<sup>118</sup> and by a video game developer to block a bad review of his game.<sup>119</sup> The problem here lies in the automatic handling of DMCA requests coupled with the little power the subjects of those requests possess to assert their legitimacy. The DMCA does have a counter notice system whereby the subject of a takedown request may dispute the claim. Following this, the entity who filed the original takedown notice has two weeks to file a lawsuit or the content will be reinstated.<sup>120</sup> However, many average users are unaware of this process and in some online situations- particularly those involving the silencing of free speech- two weeks can be enough time to do a significant amount of damage.

Third, takedown procedures ignore fundamental aspects of copyright law such as exceptions to infringement like fair use and are used to chill legitimate creativity. Fair use in the United States, Fair Dealing in the United Kingdom, and various exceptions to infringement in Europe and elsewhere protect a variety of ways in which one may use the work of another without permission. However, this body of law is completely subverted by the notice and takedown system which requires, at best, merely a feeble attempt to consider

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117 *Producers Of Nazi Romance Movie Appear To Be Using DMCA Takedowns To Silence Critics* (Gizmodo, 2020)

<https://kinja.com/api/profile/getsession?redirect=https%3A%2F%2Fgizmodo.com%2Fsetsession%3Fr%3Dhttps%253A%252F%252Fgizmodo.com%252Fproducers-of-nazi-romance-movie-appear-to-be-using-dmca-1831555053>.

118 *Another Week, Another Hollywood Company Files A Takedown Against Torrentfreak* (Techdirt, 2020)

<https://www.techdirt.com/articles/20190421/22512742056/another-week-another-hollywood-company-files-takedown-against-torrentfreak.shtml>.

119 *Video Game Developer Says He Won't Send A Takedown Of A Bad Review, Does So Anyway* (Electronic Frontier Foundation, 2020)

<https://www.eff.org/takedowns/video-game-developer-says-he-wont-send-takedown-bad-review-does-so-anyway>.

120 Digital Millennium Copyright Act 1998.

exceptions to infringement before takedowns are administered. In the United States, *Lenz v. Universal Music Corp.* established that fair use must be considered before a takedown request is sent.<sup>121</sup> However, the once-believed pivotal holding has proven relatively impotent as there is no standard by which to measure what constitutes sufficient consideration by rights holders. For example, in trying to determine whether an issuer of a takedown notice has considered fair use, ‘a copyright holder need only a subjective good faith belief that a use is not authorized’<sup>122</sup> and ‘[c]ourts are in no position to dispute the copyright holder’s belief even if [they] would have reached the opposite conclusion.’<sup>123</sup> ‘However, a court need not blindly accept a copyright holder’s claim of good faith belief when there is evidence to the contrary.’<sup>124</sup> Yet, where fair use analyses are complex and largely unpredictable in court, the burden of demonstrating that a copyright holder simply has not considered such an analysis at all is lofty. Moreover, the cost of asserting such a claim is likely to be a deterrent to most victims of notice and takedown abuse. While Section 512(f)(1) allows for damages in the form of costs and attorneys fees as a result of the misrepresentation, Courts’ application of these damages have not been particularly generous for winning plaintiffs.<sup>125</sup>

Regardless of remedies available under Section 512 for misrepresentation, users are always left to assert their rights through the notice and takedown system *after* their works have been removed. This essentially equates to a system of preliminary injunctions. Preliminary injunctions are occasionally awarded in copyright cases, but the threshold for justifying one is high and reserved only for exceptional cases.<sup>126</sup> In the notice and takedown

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121 801 F.3d 1126 (9th Cir. 2015)

122 *Ibid.* at 1153 (citing *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004))

123 *Ibid.* at 1154

124 *Alper Auto., Inc. v. Day to Day Imports, Inc.*, No. 18-81753-CIV, 2021 WL 5893161, at \*14 (S.D. Fla. Nov. 3, 2021).

125 See e.g.: *Ibid.* at \*18 (where the Court awarded damages of \$396.95 including calculations at minimum wage for the time spent trying to reinstate a removed Amazon listing).

126 A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008)

system, though, these injunctions are the standard practice. Thus, we see another example of a compromise in users' rights under the law for the sake of efficient enforcement measures for content owners.

Any abuse of the notice and takedown system should theoretically be balanced out by the system of counter notices. Under the DMCA, counter notices allow users to formally contest the removal of allegedly infringing material. Once a counter notice has been filed, the original complainant has 14 days to seek a court order restraining the user from engaging in the infringing activity or the material will be automatically reinstated.<sup>127</sup> However, research suggests that this aspect of the system may also be subject to failures. For example, Urban, Karaganis, and Schofield write:

As a procedural matter, material that is targeted by a takedown request is often removed before the target is given the opportunity to respond; this was confirmed in interviews with OSPs and rightsholders. Yet all available evidence suggests that counter notices are simply not used. It is indicative of the problem that the most memorable uses of counter notices for our rightsholder respondents were a few bad-faith, bogus counter notices from overseas pirates. Given the high numbers of apparently unchallenged takedown mistakes that showed up in our quantitative studies, we would expect to see higher numbers of appropriate, good-faith counter notices if the process were working as intended.<sup>128</sup>

The notice and takedown system was designed to efficiently replicate copyright adjudication for infringements online thereby relieving pressure from the courts to carry this burden. However, in doing so, many of the compromises made to achieve efficiency have come at the expense of users' rights.

## **B. Technical Protection Measures**

Modern technology has given rise to digital tools that enable the controlled use of copyrighted works. These tools are commonly known as digital rights management (DRM). A subset of DRM are technological protection measures (TPM) or bits of code used to

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<sup>127</sup> 17 U.S.C. §512 (g)(2)

<sup>128</sup> Urban, J.M. et al. (2017) *Supra* n. 106

safeguard digital copyrighted works from infringement. These are industry tools and not legislative acts, though the technology often has legislative backing.<sup>129</sup> DRM technology represents content owners using the very technological advancements that made infringement so easy as a tool to help them reassert the necessary control over their digital creative assets for the current property system to continue functioning. However, the use of such technology as an enforcement mechanism for copyright law has presented two fatal issues. First, the technology ignores fundamental aspects of copyright law, namely fair use and exceptions to infringement, in order to serve its prescribed purpose. Second, despite sacrificing users' rights, the technology is not generally effective at preventing actual infringements.

Technological protection measures seek to serve one purpose- preventing unauthorised copying of copyrighted materials. In doing so, TPMs serve to undermine other important aspects of copyright law- namely users' rights in the forms of exceptions to infringement. For example, the phonographic industry uses DRM to "fight digital piracy" yet compliance with copyright exceptions to infringement is not one of their stated goals.<sup>130</sup> The use of technical protection measures to enable control over a digital copyrighted work typically ignore the rights of users in two ways. First, TPMs will block a legitimate user of a copyrighted work from format and/or time shifting that work. Second, TPMs will prevent the work from being copied not only in circumstances of infringement but also for legitimate reproductions where the use would qualify as fair (or a similar exception to infringement in other jurisdictions).

Format and time shifting are largely legitimised practices in modern copyright law. In the United States, the practice of time shifting, or recording a piece of lawfully accessed copyrighted material for the purpose of accessing it later in time, was ruled to be a fair use in the infamous "Betamax" case.<sup>131</sup> While this case addressed time shifting, there is no legal

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<sup>129</sup> It is illegal to bypass DRM technology in many jurisdictions.

<sup>130</sup> See e.g. the website of the International Federation of the Phonographic Industry at [www.ifpi.org](http://www.ifpi.org)

<sup>131</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

holding with regards to format shifting and fair use in America. Moreover, the anti-circumvention laws in the DMCA make it illegal to bypass any DRM technology imbedded in a copyrighted work even for the legitimate purpose of time shifting.<sup>132</sup> Furthermore, the legislation backing DRM/TPM technology shifts the legal focus away from the actual goals of the software- to prevent piracy- to a more restrictive place. The question for courts dealing with infringement cases concerning DRM/TPM technology is not whether an actual infringement occurred, but rather simply *was the technology circumvented in some way?*<sup>133</sup> The actual purpose of copyright law and the means by which digital locks may be used to further that purpose is all but lost in this process. Instead, we are left with a legally-backed enforcement mechanism that encourages anti-competitive behaviour and ignores fundamental rights of users under the same law it seeks to enforce.

Ignoring users' rights is likely seen as the necessary cost of protecting works from large scale piracy. This *could* perhaps be a forgivable trade off *if* the technology actually worked. However, as it stands, it does not. While TPMs are typically sophisticated enough to prevent average users from accessing the digital information necessary to make unauthorised copies of the works in which they are imbedded, they fail to provide absolute protection. TPMs offer no protection against savvier users and professional infringers. "There is no DRM system, however sophisticated, that cannot be worked around if you have the right expertise."<sup>134</sup> An article in 2002 stated plainly that "to this day, every DRM system with economic significance has been 'cracked.'"<sup>135</sup> In the United States, Congress enacted the

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132 17 USC §1201 (a)(1)(A)

133 Ali Matin, *Digital Rights Management (DRM) in Online Music Stores: DRM-Encumbered Music Downloads' Inevitable Demise as a Result of the Negative Effects of Heavy-Handed Copyright Law*, 28 Loy. L.A. Ent. L. Rev. 265, 271-2 (2007).

134 Halderman, A. and Felten, E., *Lessons from the Sony CD DRM Episode* (2006) Center for Information Technology Policy Department of Computer Science Princeton University, published online <http://itpolicy.princeton.edu/pub/sonydrm-ext.pdf> at 23.

135 Oksanen, V. and Välimäki, M., *Transnational advocacy network opposing DRM - A technical and legal challenge to media companies*, *International Journal on Media Management*, 4:3, 156-164 (2007).

“anti-circumvention” provisions of the DMCA for this very reason.<sup>136</sup> It was responding to concerns voiced by content owners that their works would be pirated despite any digital protection measures they implemented.<sup>137</sup> Moreover, once the DRM is bypassed, the unlocked version can be uploaded to the internet to be accessed by anyone who wishes to do so- particularly the class of casual pirates that DRM is designed to obstruct. Once an unlocked version of a copyrighted work enters this space, it falls into the realm of notice and takedown protection and there is virtually nothing that can be done to completely remove it from the internet. Therefore, anything but absolute protection is functionally the same as no protection at all.

The use of code to safeguard digital works from unauthorised reproductions in the modern world makes sense in theory. Rapid technological growth over the last 30 years has caused the wave of mass infringements that have plagued copyright owners. Using the very technological advancements that made copyright enforcement so difficult for content owners as a shield to re-establish the sense of inaccessibility that made pre-internet copyright law so easy to enforce feels elegant. However, the costs of such a solution must not be ignored. Copyright law is not designed as a one-sided protection for creators and content owners. It is a nuanced balancing act constantly seeking to resolve the rights of those who own content and those who engage with it. Any enforcement mechanism that ignores the rights of those represented by half of this equation is unacceptable- especially one that is otherwise ineffective.

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<sup>136</sup> 17 U.S.C. ( 1201; see 144 Cong. Rec. H7093, H7094-95 (Aug. 4, 1998); S. REP. No. 105-90 at 29 (1998); H.R. REP. No. 105-551, pt. 1, at 18 (1998); H.R. REP. No. 105-551, pt. 2, at 38 (1998)

<sup>137</sup> Jessica Litman, *Digital Copyright: Protecting Intellectual Property On The Internet* (2000) Prometheus Books, pg. 89-150.

### C. Content Filtering Software

Gatekeeping software is the newest iteration of the content industry's attempts to assert control over copyrighted works online. It is the logical extension of the enforcement mechanisms discussed up to this point and essentially uses technology to automate the notice and takedown process. As such, it suffers from many of the same weaknesses. I have discussed these weaknesses thoroughly in a previous essay written at a time where the European Union was considering mandatory copyright filtering technology for certain online content sharing service providers.<sup>138</sup> Generally, content filtering technology is a tool of protection and enforcement that ignores users' rights in the same veins as the two preceding enforcement mechanisms.

While the technology that powers existing content identification software is undeniably complex and sophisticated, the resulting capabilities of that technology are actually simple. Content identification software systems rely on compiling massive databases of content and using fingerprinting technology to mark that content in order to determine whether a piece of uploaded content matches in whole or in part any piece of content in their database. This process is performed simply under a match or no-match condition. In other words, the sole objective, and only capability of the tech, is to determine whether the scanned content matches a piece of content from the database.

The software has the ability to detect reproductions of audio and video digital files with a high but questionable degree of accuracy.<sup>139</sup> However, copyright law is both complex and, at times, indefinite. The first step of an infringement analysis will invariably involve a determination of similarity and access- regardless of jurisdiction. In theory, content identification software will correctly identify direct copying which would satisfy the required

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<sup>138</sup> Longan *supra* n. 93

<sup>139</sup> *Ibid.*

analysis for both of these factors. However, to reduce the process of analysing infringement solely to these two steps is an unfair and simplistic application of the law because infringement analyses typically require far more considerations than simply access and similarity. The simple match/no-match process of content identification software fails completely to address the more complex aspect of copyright law regarding fair use and works that should be treated as such are regularly flagged as infringements.<sup>140</sup>

Moreover, copyrighted works are licensed to users every day. This can occur through traditional channels involving contracts or, more often, through tolerated use initiatives by content owners in the form of no action policies. With regards to licensed material, YouTube's Content ID software has blocked content containing legally-obtained stock audio with such regularity that companies are offering specific advice for how their customers may dispute these claims.<sup>141</sup> Video game companies are at the forefront of tolerated use policies, with a particularly active and engaged fan base that bolsters the value of their copyrighted materials through various digital fan works such as LetsPlay videos. These videos are tolerated by most game development companies with specific policies listed on each company's website. Ubisoft, a game company that has supported user engagement in the form of fan videos and otherwise, spoke out in support of its fans who were issued Content ID claims for videos containing permitted footage from its games.<sup>142</sup> Generally, current

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140 Cushing, T., *YouTube Kills Livestream Of Convention When Audience Starts Singing 'Happy Birthday'* (TechDirt, Oct. 15, 2013) <https://www.techdirt.com/articles/20131014/15323524876/youtube-kills-livestream-convention-when-audience-starts-singing-happy-birthdayshtml>. See Also: Resnikoff P, *Sony Music Says a Harvard Copyright Lecture Violates Its Copyrights...* (Digital Music News April 25, 2017) <https://www.digitalmusicnews.com/2016/02/17/sony-music-takes-down-a-youtube-lecture-about-copyright-issues/> (Where a Harvard law school copyright lecture was taken down for including parts of Hendrix's "Little Wing" despite being a textbook example of fair use) And: Jackson G, *Nintendo Flags YouTuber For Using Switch Sound* (Kotaku Australia March 8, 2017) <https://www.kotaku.com.au/2017/03/nintendo-flags-youtuber-for-using-switch-sound/>. (Where a Content ID claim was made for a "Ready...Fire!" sound effect from the Nintendo Switch)

141 McElwain J., *Solving YouTube Content ID Claims for Stock Audio* (Storyblocks Blog, 2018) <https://blog.storyblocks.com/storyblocks-features/youtube-content-id-claims-stock-audio/>.

142 Totilo S, *YouTube Copyright Chaos Continues. Game Publishers To The Rescue?* (Kotaku, December 12, 2013) <https://kotaku.com/youtube-copyright-chaos-continues-game-publishers-to-t-1481517758>.

examples of filtering technology are not only incapable of determining if a publication would qualify for an exception to infringement but are also unable to recognise if the work has been properly licensed or if the use is tolerated by the content owner.

Finally, claims are even, at times, issued via filtering software by those who are not the rightful owners of a copyright. Examples include a claim made for a song in the public domain,<sup>143</sup> a magazine claiming ownership of a screenshot from a video game because it was published in one of their editions,<sup>144</sup> and Universal Music Group licensing a song from an indie artist to use as a backing track in an audiobook and then using that audiobook as a proxy to claim ownership for the original sound recording of the song.<sup>145</sup>

These failings to distinguish the intricacies of copyright law become especially unacceptable when considering that the current leading filtering software still fails to simply identify 20-40% of music recordings within its database.<sup>146</sup> Content filtering software is yet another copyright enforcement mechanism that effectively weakens users' rights in the digital environment.

### ***iii. Lack of access to proper licensing mechanisms***

While facing unnecessarily long terms of copyright protection as well as enforcement mechanisms that will often prevent secondary uses of works- even those that are technically legal- the process of actually obtaining a license to make a derivative is often nearly impossible for the average secondary creator. This is because licenses can be difficult to

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143 *YouTube's Content ID System Brings Humbug to the Holidays* (Adam the Alien Productions, January 7, 2014) [http://adamthealien.com/2013/12/23/youtubes-content-id-system-brings-humbug-to-the-holidays/#.W1b2Vy\\_My1s](http://adamthealien.com/2013/12/23/youtubes-content-id-system-brings-humbug-to-the-holidays/#.W1b2Vy_My1s).

144 Totilo *supra* n. 142.

145 *UMG Licenses Indie Artist's Track, Then Uses Content ID To Claim Ownership Of It* (Techdirt.)

<https://www.techdirt.com/articles/20150317/10513630347/umg-licenses-indie-artists-track-then-uses-content-id-to-claim-ownership-it.shtml>.

146 Ingham T, *YouTube's Content ID Fails to Spot 20%-40% of Music Recordings* (Music Business Worldwide, July 13, 2016) <https://www.musicbusinessworldwide.com/youtubes-content-id-fails-spot-20-40/>.

obtain in the first place and, when available, often come with exorbitant price tags making them functionally unavailable for the average person. The system of using property rules to govern licenses for derivatives has become prejudicial against average creators in favor of wealthier, more established professionals and organisations. The argument for the status quo is that access is and will always be available for all but must be negotiated privately and individually with the copyright holder in the spirit of a free market. These negotiations will inevitably be guided by relevant economic and non-economic factors alike— i.e. the perceived value of the work, the current demand for licenses, the perceived economic and intangible effects of granting the license on the commercial value of the work, etc. This free-market system functionally serves to deny access to the most socially-relevant works for all but the wealthiest of secondary creators.<sup>147</sup> Second, the non-economic factors associated with determining the price for a license often include unreasonable emotional attachments by authors to their works which can lead to outright denial of licenses or inflated prices beyond actual market value. Finally, the system of upfront payments coupled with the often high prices of obtaining a license discourage secondary creativity in general- not just for amateur or pseudo-professionals- because of the steep investment costs that must be paid before the secondary creator has any idea what the commercial success of her work may be.

The cost of a license to make a derivative is often exorbitant and out of the range of access for most secondary creators.<sup>148</sup> Economic theories claim this cost is justified. The use of a copyright, like that of any other good, is worth whatever price the seller is able to charge in a free market. However, copyrights are not governed by a free market. There is no

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147 Norek, Comment, *You Can't Sing without the Bling: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA Ent. L. Rev. 83, 90-91 (2004) (arguing that the high cost of licensing samples for remixes prevents new music from being developed and unfairly favours established, wealthy artists).

148 See: Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 Albany L. J. of Sci. & Tech. 261, 273 (2009) ("Flat fees are generally made available, with prices set between one and five thousand dollars")

competition because each individual work is unique and subject to temporary limited monopoly rights. While this is by design, as these monopoly rights are in place to ensure the commercial viability of creative works and thereby promote their creation, extending these monopoly rights to derivatives overshoots this purpose. Moreover, the use of free-market economics to govern a market that is not free allows for secondary and irrelevant factors to artificially inflate the price of a copyright. For example, authors often allow emotional attachments to their creations to affect their prices or even willingness to consider a licensing offer.<sup>149</sup> This is especially true when the proposed license would have a perceived negative effect on the author's reputation.<sup>150</sup> Studies done on libel claimants suggest that no amount of money will make ridicule worthwhile.<sup>151</sup> Allowing the market for copyright derivatives to operate freely has fostered an environment that chills secondary creativity for amateur and pseudo-professional creation.

However, the property rule system for derivatives also chills secondary creativity from professional sources. While it is true that inflated prices have created a paywall blocking entry for less established or financially-flush creators, the same system also serves to deter secondary creativity from even the wealthiest creators. While high price thresholds may be surmountable for the larger content companies, the high investment cost will limit their willingness to make secondary creations but for the most financially safe investments. As a result, the most popular creative franchises like Harry Potter, Star Wars, and Marvel will find investment money for derivatives despite the high price tags but less proven works will not.

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149 Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. Colo L. Rev. 79, 84 (1991).

150 *Ibid.* at 103

151 Robert J. Morrison, *Derivers' Licenses: An Argument for Establishing a Statutory License for Derivative Works*, 6 Chi-Kent J Intell Prop 87, 103 (2006-2007). Citing: *Ibid.* at 105.

We have allowed the law to develop in such a way that creativity, particularly secondary creativity, at best, has become a privilege unique to the wealthy and, at worst, is deterred for all but the original creator of a work. Copyright terms have been extended to such a degree that no person will likely live long enough to see a work created during her lifetime enter the public domain. Works made using exceptions to infringement and laws of fair use are being treated as infringements online without repercussions. Licensing is a tool of the law that finds utility in only a small percentage of the creative community and serves more often as a barrier to new creation. Changes must be made to the law in order to redirect some creative power into the hands of users and non-corporate creators.

#### **4. Conclusions**

Copyright law is a philosophical and economics-based legal construct that sets out to protect perceived rights of creators- both moral and economic- as a means to incentivise production of new creative works for the benefit of society. This essay has discussed the underlying philosophies that serve as the basis for copyright law within the scope of users' rights and secondary creativity. While I have left the right of reproduction alone as there is much literature already on the subject and I have no desire to contest its utility in the modern world, I find that none of the theories analysed offer any justification for the strong derivative rights the law offers creators. Moreover, each theory seems to advocate for a strong balance of power between primary and secondary creators. Today, the law offers far less balance. The safety valves in place designed to promote secondary creativity and protect the rights of secondary creators such as the public domain, exceptions to infringement, and licensing mechanisms have become distorted over the course of time and legal evolution to the point that they no longer function as such. They have become impotent tools and empty promises.

The solution to this problem of imbalance in the legal dichotomy is a shift in the nature of copyright law itself- in at least some facets- from that of a property right to a

liability right. In the 1990s, Robert Merges wrote a paper urging American legislators against the use of liability rules to solve intellectual property rights issues in new media.<sup>152</sup> Merges premised his argument on the value of collective rights organisations and claimed that “society and industry will be better off if Congress exercises restraint, creating an environment in which private organisations can flourish.”<sup>153</sup> Merges analysed the Calabresi-Melamed Framework,<sup>154</sup> which subdivides all legal entitlements into either those governed by “property rules,” “liability rules,” or “inalienable entitlements.”<sup>155</sup> These two types of rules govern the way entitlements are treated. Calabresi and Melamed define an entitlement as the legally prevailing interest when two or more opposing interests conflict.<sup>156</sup> Property rules are rooted in control and require permission from, and often payment to, the owner of the entitlement.<sup>157</sup> An example of this sort of entitlement in the intellectual property context is traditional licensing negotiation for use of a work. The owner of a copyright is granted power under the law to license it at her discretion and therefore permission is required up front for any potential licensor to make use of the work. However, liability rules, allow for the destruction of an original entitlement in cases where an objectively determined price is paid to do so.<sup>158</sup> Merges claimed these rules “are best described as ‘take now, pay later.’”<sup>159</sup> These sets of rules allow the use of an entitlement by anyone who wishes to do so as long as adequate compensation is paid later.<sup>160</sup> Merges describes the concept of eminent domain as

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152 Robert Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, California Law Review, Vol. 84, No. 5, 1293 (Oct. 1996).

153 *Ibid.* at 1300.

154 *Ibid.* at 1302.

155 *Ibid.* See also: Calabresi, G. and Melamed, D., *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, vol 85 no 6 Harvard L. Rev. 1089, 1092 (1972).

156 *Ibid.* at 1090.

157 *Ibid.* at 1092.

158 *Ibid.*

159 Merges (1996) *supra* n. 152 at 1302.

160 *Ibid.*

the quintessential liability rule, but in the IP context, compulsory licenses fall distinctly into this category of rules.

Merges criticised the use of liability rules to govern IP licensing for a number of reasons. First, compulsory licenses create standardised and inflexible valuations for a diverse body of goods.<sup>161</sup> Second, standardised valuation creates a price ceiling that results in top-down bargaining outside the compulsory scheme.<sup>162</sup> Third, compulsory license valuations are a legislated mechanism and are subject to pitfalls of the current legislative system including disproportionate influence from lobbyists and difficulty of revision leading to system obsolescence.<sup>163</sup>

While these are valid points, these obstacles are not insurmountable. Moreover, there would be vast benefits to society associated with the introduction of liability rules to govern certain aspects of copyright protection. Such a move, if applied narrowly, would redistribute power to make derivative creations by removing the upfront financial and permissive barriers to do so while still ensuring a healthy pecuniary interest in derivatives for copyright holders. Liability rules would serve to immediately shift the balance of power in copyright derivative licensing in two ways. First, they would open access by dissolving the system that allows for the absolute refusal of licenses or functional refusal via overvaluing a work. Second, they remove the upfront barriers to secondary creation brought about by steep investment costs associated with derivative licenses by offering a take-now-pay-later system. The result will obviously diminish the value of derivative rights. However, a narrow focus when establishing the law will limit this reduction in value for content owners while simultaneously spurring new creative production and thereby creating new revenue streams for both owners and secondary creators. The value will not dissipate but will be redistributed.

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<sup>161</sup> *Ibid.* at 1311

<sup>162</sup> *Ibid.* at 1305

<sup>163</sup> *Ibid.* at 1313

This paper does not have the scope for discussion of how such a system may be designed or implemented but it is a topic for analysis in a future article.