with the lock-and-key on the desk drawer containing an author's unpublished manuscript, the point seems noncontroversial. Access controls may, however, comprise far more. If information is published in a newspaper, a teacher can copy a paragraph to initiate a class discussion; if the same information is provided only on the Internet, it can be made available exclusively on a pay-per-use basis, protected by contractual restrictions and technological safeguards. Indeed, technology makes it possible for information proprietors to treat every use — even every reading — of a digital work available via the Internet as a new instance of "access." In this way, some fear, such proprietors could maximize economic returns while continuing to withhold their works from general public scrutiny, including critical "fair use."

In response, information proprietors argue that because their motive in making material available by way of digital networks is *precisely* to maximize profits, consumers should have no concern about being frozen out of "access." To the contrary, they assert that, in a network environment characterized by ubiquitous electronic licensing, all kinds of uses will be possible upon the payment of fees which will be individually trivial (although cumulatively significant). Clearly, a pay-per-use information environment may represent a dystopia or a utopia, depending on one's perspective.

Copyright policymakers today face issues beyond those that have arisen in the past in connection with new information technologies. Previously, it was enough to ask how traditional copyright principles applied to new media — or, at most, how those principles might be adapted to make such application more readily feasible. Digital technology in general, and digital networks in particular, invite us to undertake a more fundamental inquiry. Even if traditional copyright doctrines may not apply comfortably in cyberspace, we could, of course, work toward installing their functional equivalents, so as to assure the maintenance in this new environment of the "balance" of proprietary and user interests which traditionally has characterized this branch of our law of intellectual property.

§ 1.06 THINKING AND TALKING ABOUT COPYRIGHT LAW

[A] In General

The preceding sections of Chapter 1 trace the history of Anglo-American copyright law, seeking to place it in the context both of related bodies of U.S. law and of "authors' rights" laws elsewhere in the world, and to highlight the mechanisms and challenges that have made, and will continue to make, this ever-evolving field of study so fascinating and rewarding. Before proceeding, we take the liberty of raising one final topic: the practical and philosophical perspectives that inform and shape the "discourse" of copyright law.

Under the U.S. Constitution, Congress has the *power* to secure to authors for limited times exclusive rights in the creations of their minds. It has, on the other hand, no *obligation* to secure *any* such rights. Nor, for that matter, did the

Parliament that enacted the Statute of Anne operate under any legal requirement to do so. Yet for over 300 years this body of law not only has continued to exist, but has continued to expand. Why?

Whether property rights should be recognized in products of the mind is a question which challenges fundamental assumptions about why society creates property rights in the first place. Few today would question the correctness of granting property rights in land or chattels, including manufactured products. But when the subject turns to intangible property, *i.e.*, to intellectual products, that consensus breaks down. There is, as we write, an on-going and lively disagreement about the very nature, and the proper scope, of the protections that are and should be made available under our law for the latter sorts of goods.[1]

Discomfort with recognizing property rights in products of the mind runs through the common law. Under common-law doctrine, property rights arose from possession. But intellectual products were quite unlike land or chattels because, once disseminated publicly, ideas and other intangibles were not subject to exclusive possession. Justice Brandeis reflected this view in a famous dissent:

> The general rule of law is, that the noblest of human productions — knowledge, truths ascertained, conceptions, and ideas — become, after voluntary communication to others, free as the air to common use.

International News Service v. Associated Press, 248 U.S. 215, 250 (1918).

This discomfort notwithstanding, intellectual property rights in general, and copyright in particular, have grown apace over the past three centuries. In the few pages that follow, we address the question of why this should be so. Further discussion will appear in succeeding chapters.

[B] Copyright and "Interest Analysis"

Like other kinds of property law, copyright serves several ends. It establishes the conditions for the existence of a market — in this case, a market in information — and, by defining specific rights, it performs the allocational function of helping to determine "who (in society) gets what" where information resources are concerned. The content of copyright law, like that of other bodies of legal doctrine, is the outcome of centuries of advocacy on behalf of various constituencies whose interests are affected by the laws governing artistic and literary property. One way of thinking about developments in copyright law — whether historical or contemporary, judicial or legislative — is to inquire who benefits from any particular development or set of developments.

Broadly speaking, the three groups in society who might stand to gain from any change in copyright law are:

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[1] *See, e.g.*, Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 Cal. L. Rev. 1413 (1992); Vaver, *Intellectual Property Today: Of Myths and Paradoxes*, 69 Can. Bar Rev. 98 (1990); Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 Hamline L. Rev. 261 (1989); Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stan. L. Rev. 1343 (1989).

- individual creators, who write, paint, photograph, compose or program copyrighted works into existence;
- distributors (*i.e.*, booksellers, publishers or disseminators), who facilitate the delivery of creative works to consumers; and
- consumers themselves.

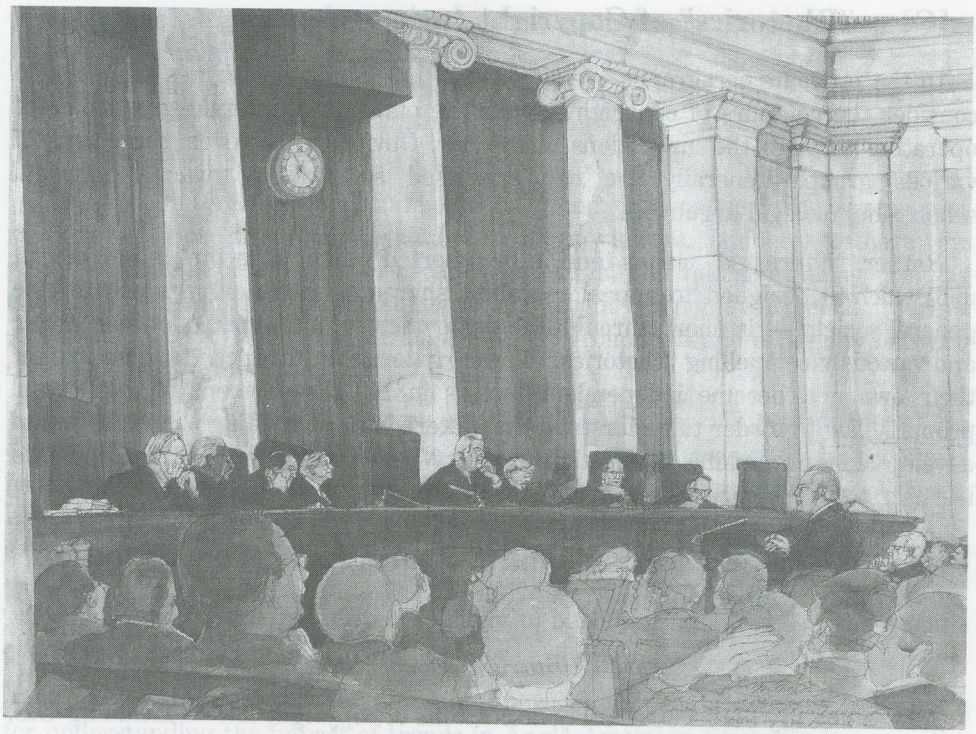
This last "interest group," it should be noted, is a particularly diverse one, ranging as it does from end-consumers (readers, viewers, listeners) to those who re-use copyrightable content to create new works, and taking in along the way educators, researchers, journalists, *et al.* Or, to put the point differently, there is significant overlap among the various "interest groups" — and especially between creators and consumers.

Sometimes, the interests of some or all of these groups will be congruent. The decision to extend protection to some new, important and previously unrecognized form of creative production may be a net gain for all concerned. Sometimes, however, the interests of these groups may be divergent or even antithetical. For example, cutting back on "fair use" privileges may benefit distributors (and perhaps creators) at consumers' expense, while introducing "moral rights" principles into a copyright system is likely to benefit creators (and perhaps some consumers) at the cost of distributors.

Crude though this "interest analysis" approach may be, it gives us some basis for understanding the impact of trends in Anglo-American copyright law over the past 300 years. Generally speaking, the history of copyright since the Statute of Anne has been one of increase. Protection has been afforded to a progressively larger variety of works, for longer periods of time, against a wider range of unauthorized uses.

Likewise, the perspective of interest analysis may help us to appreciate the significance of the fact that copyright began in England with the efforts of the Stationers' Company (whose members were neither creators nor consumers of works) to secure legal protection for the interests of the book trade, and that developments in U.S. copyright history often have resulted from the lobbying and litigation activities of latter-day distributors (publishing houses, movie studios, record companies and other such entities), not so different from those ancient booksellers.

This is not to say, of course, that only distributors have benefited from these developments. Although commercial distributors seeking to establish information markets may drive the development of copyright law, everyone in society stands to gain from the establishment of such markets — up to a certain point. Beyond that point, however, the allocational effects of changes in copyright law may yield disparate consequences for various interest groups. We suggest, therefore, that such developments should be continually examined, individually and collectively, to determine their impact on the distribution of information resources within society.



Supreme Court Oral Argument
Courtesy of the Supreme Court Historical Society

The utilitarian position always has been premised, at least implicitly, on economic reasoning. In recent years, its economic foundations have become more and more explicit. Incentives in the form of legal protection are needed if works of the mind are to be brought to market, the argument runs, because of the special characteristics of such intangible commodities, which once created cannot be used up, and which can be used by large numbers of people at the same time. In other words, intellectual productions qualify as "public goods," because producers cannot appropriate their true value through sale. Accordingly, economic theory teaches, there is a risk that a suboptimal amount of information will be produced or disseminated.

Sometimes, of course, the problem vanishes because the producer's or distributor's natural "lead time" enables it to derive a sufficient profit to justify its investment and to encourage continued activity.[3] But where "lead time" does not provide a sufficient return — as where investments in a work can only be recouped

[3] This argument is elaborated in Breyer, *The Uneasy Case for Copyright: A Study in Copyright of Books, Photocopies and Computer Programs*, 84 Harv. L. Rev. 281 (1970). *Cf.* Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. Rev. 1100 (1971); *see* Breyer, *Copyright: A Rejoinder*, 20 UCLA L. Rev. 75 (1972). For a general consideration of the strengths and limitations of the economic theory of copyright, see Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stan. L. Rev. 1343 (1989).

over time or through the exploitation of ancillary markets — the solution to the public goods problem is to provide special incentives for the desired activity — either in the form of direct government subsidies, or by granting limited monopoly rights to copyright owners.

Economists recognize, however, that the incentive solution can also be the source of new difficulties — at least when the solution takes the form of the creation of new property rights. Free market economics disfavors the creation of monopolies unless there is an economic justification. Because of the exclusionary rights she possesses, the owner of the copyright in a work can charge a higher-than-competitive price for her product, resulting in a less-than-optimal diffusion of information.

Thus, the rhetoric of incentives in copyright law, as it has been developed, has sought to embrace considerations of public welfare. Copyright law attacks the "public goods" problem by recognizing a property right in the work, but the exercise of that monopoly is carefully circumscribed through regulation. On the one hand, copyright provides the incentive to create new products and an economic motivation to distribute them. On the other hand, the copyright owner's monopoly right is limited in time and scope by such doctrines as originality, the idea/expression dichotomy, and fair use (all discussed in detail hereinafter). Viewed in this way, copyright law should represent an economic trade-off between encouraging the optimal creation and distribution of works of authorship through monopoly incentives, and providing for their optimal use through limiting doctrines.

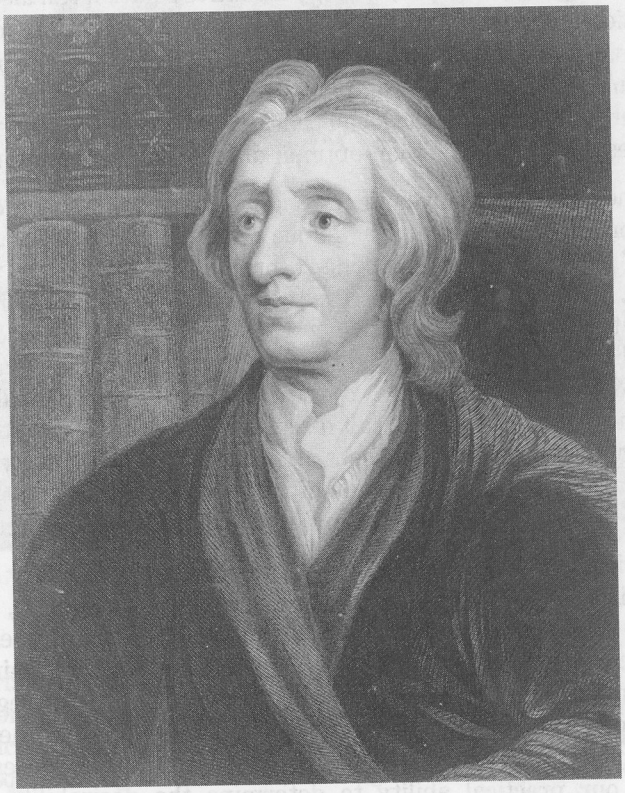
The "utilitarian" conception of copyright gives us one vocabulary for discussing the ways in which our collective life may be affected, for good or ill, by changes in the law. While there is room for doubt about whether the scope of copyright protection affects significantly the behavior of individual poets, painters or computer programmers, there is little question that changes in the legal exclusivity which distributors enjoy in the works they distribute can affect their investment decisions and business planning. This insight, of course, does not necessarily extend by very much our practical ability to determine the desirability of particular changes in copyright law by assessing their impact on public welfare. Presumably, there is an optimal level of protection beyond which providing additional incentives to distributors will yield little or no net gains in the quantity or quality of works effectively available to be consumed by the public. But any attempt actually to quantify that level of protection raises difficult and probably insoluble methodological questions.

The "Natural Law" Conception

Competing with the "utilitarian" rhetoric in American copyright discourse, from the earliest era of the Republic down to the present day, is the alternative rhetoric of "natural rights" or "inherent entitlement." The natural law justification for recognizing property rights in works of authorship is based on the rights of authors to reap the fruits of their creations, to obtain rewards for their contributions to society, and to protect the integrity of their creations as extensions of their personalities.

Locke and the Labor Model. The proposition that a person is entitled to the fruits of her labor is a compelling argument in favor of property rights of any kind,

tangible or intangible. The most famous proponent of this natural rights theory was John Locke, the 17th Century English philosopher, who reasoned that persons have a natural right of property in their bodies. Owning their bodies, he believed, people also own the labor of their bodies and, by extension, the fruits of their labor. *See* J. Locke, SECOND TREATISE OF GOVERNMENT, Ch. 5 (1690).



John Locke (1632-1704)
Corbis

In England itself, Lockean reasoning had little prominence in the campaign to establish the new law of copyright which culminated in the Statute of Anne in 1710. Across the English Channel, however, the emphasis on "authorship" and "authors' rights" provided the primary ideological justification for the recognition of new legal interests in literary and artistic creations in 18th Century European intellectual property law, and a convenient basis on which those interests could be allocated. Both of these developments were urgently required if the new statutes were to serve the needs of the emerging commercial marketplace in works of the imagination. Ultimately, the belief in the paramount importance of "authorship" was to take on a significance of its own, marking the doctrinal landscapes of national law systems which emerged in countries such as France and Germany.[4]

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[4] For general discussion of "authorship" as a legal concept, see Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 41 Duke L.J. 455 (1991). *See also* Chartier, *Figures of the Author, in* OF AUTHORS AND ORIGINS 7 (B. Sherman & A. Strowel, eds. 1994).

The natural law justification for copyright continues to enjoy considerable currency throughout the world. Perhaps most importantly, it has animated successive revisions of the Berne Convention for the Protection of Literary and Artistic Property, up to and including the 1971 Paris Revision,[5] to which the United States adhered in 1989.

It would be wrong, however, to regard the "natural rights" conception of copyright as a mere recent European import in England and the U.S. The claims of "authorship" exerted a shaping influence in late 18th and 19th Century British copyright. Likewise, Lockean rhetoric has been part of the discourse of American copyright law since the 1790 Federal Copyright Act, and even before — in tension with the utilitarian conception discussed above.[6]

Lockean rhetoric remains a crucial part of the discourse in copyright jurisprudence today. In its present-day form and as applied to copyright, this view holds that an individual who has created a piece of music or a work of art should have the right to control its use and be compensated for its sale, no less than a farmer reaps the benefits of his crop. In addition, because the author has enriched society through his creation, the author has a fundamental right to obtain a reward commensurate with the value of his contribution.[7]

Like the rhetoric of incentives, the rhetoric of natural entitlement has struggled to incorporate considerations of what might be called the public interest in access. In particular, leading scholars have drawn on Locke's famous *proviso*, limiting property rights based on individual labor to situations "where there is enough and as good left in common for others," to suggest how a natural rights approach could be reconciled with the public's entitlement in the "informational commons."[8]

Like the utilitarian conception, the Lockean justification for copyright law provides a useful vocabulary, but is finally indeterminate insofar as its specific implications are concerned. The theory maintains that the author should have control over his work, but indicates little about *how much* control the author should have, how long that control should last, who should benefit from the copyrighted work, or what on any given set of facts constitutes just compensation for the author's contribution to society.

Hegel and the Personality Model. The most influential alternative to the labor-based Lockean model of natural law is one based on a personality justification. Associated with the German philosopher Hegel, and embodied in "moral rights" legislation, the personality model advances the idea that property provides a means

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[5] *See* § 1.04. Nor should one overlook the 1948 Universal Declaration of Human Rights, which at Article 27(2) reads: "Everyone has the right to the protections of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author."

[6] "Bracketing the slavery issue, there was perhaps no debate more insistent for writers in antebellum American than the issue of literary property." G. Rice, THE TRANSFORMATION OF AUTHORSHIP IN AMERICA 77 (1997).

[7] For an overview of natural law theory, see Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L. Rev. 517 (1990).

[8] Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1562–83 (1993).

In summary, then, the utilitarian and natural law views (both of Locke and of Hegel) raise a good many questions to which they do not offer definitive answers. However, recognition of the ultimately indeterminate character of these contrasting rhetorics has not detracted from their popularity in the discourse of copyright law and policy. It is fair to say that, throughout the history of Anglo-American copyright, these rhetorics have been successfully deployed to explain or justify virtually every extension of the scope or intensity of copyright protection. They have also been invoked (usually with somewhat less success) in arguments against such expansionist developments.

The history of American copyright law has not reached an end, though — and there is more to the story.

[2] Other Rhetorics in Contemporary Copyright Discourse

In the scholarly literature and judicial decisions of recent years, a number of alternative ways of characterizing copyright and the purposes of the copyright system have begun to gain currency. Some of these rhetorics are new, while some have long and respectable, if not always extensive, histories. Some are offshoots, at least in part, in the traditional rhetorics described above, while others can claim a greater degree of autonomy. All of them add to the richness, if not necessarily the certainty, of copyright discourse.

The rhetoric of misappropriation. This characteristic rhetorical mode draws heavily on both utilitarian and natural law arguments, although invocations of it tend to appear in the guise of simple appeals to "fairness." How can it be right, the usual form of the argument begins, for one to profit (as a "free rider") from the outcome of the intellectual labor of another — to "reap where he or she has not sown"? Surely, the very fact that someone has cared enough to appropriate the products of another's mind must indicate that those products were worth something, and therefore deserving of legal protection.

The rhetoric of misappropriation has roots in the traditional doctrines of quasi-contract and restitution.[10] Moreover, the independent tort of misappropriation has a long, if somewhat checkered, history in both federal and state law, where it has sometimes been invoked in cases where copyright and patent law fail to provide remedies for the taking of mental creations. More recently, misappropriation rhetoric has provided an important part of the rationale for the development of new state causes of action for violation of the "right of publicity." The proliferation of state unfair competition law based on concepts of misappropriation has, in turn, created difficult preemption issues, which have yet to be satisfactorily resolved.[11]

Here, however, we want to note that the rhetoric of misappropriation has also found its way into the mainstream discourse of copyright itself. Courts invoke it in their decisions, and so do advocates for changes in copyright legislation. A good recent instance can be found in the (ultimately successful) arguments for the

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[10] *See generally* J. Dawson, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951).

[11] *See generally* Chapter 11.

extension of the term of existing copyrights by an additional 20 years, to life-plus-70. Why, argue the children of deceased popular songwriters, should someone else benefit from the continued popularity of their parents' enduring hits, no matter how long ago they were composed?[12]

The difficulty with the rhetoric of misappropriation, at least where it is applied to copyright, may be apparent from the foregoing example. Powerful though it may be in its appeal to fundamental fairness, the tendency of misappropriation-based reasoning is infinitely expansive, insofar as the length, breadth and strength of rights are concerned. Put differently, the misappropriation justification, unlike those predicated on incentive-based or even natural entitlement principles, contains no internal checks. Without *external* checks, therefore, an intellectual property system based on ideas of misappropriation would protect every product of the mind, for an unlimited period, in the name of "fairness."

Obviously, copyright law is not likely to be remade along these lines any time soon. But the expansive pressure generated by the rhetoric of misappropriation is nonetheless a force to be reckoned with. Indeed, the next rhetoric to be discussed has gained currency (at least in part) because it seems to provide a basis for restraining the forces which misappropriation rhetoric has helped to release.

The rhetoric of the public domain. The core notion here has been stated as follows:

> [T]he existence of a robust, constantly enriched public domain of material not subject to copyright (or other intellectual property protection) is a good in its own right, which our laws should promote at the same time as they provide incentives or reward creativity.

Lange, *Recognizing the Public Domain*, 44 Law & Contemp. Probs. 147 (1981).[13]

Foregrounding the inescapable truth that all copyrightable works eventually become common property at the end of a period of protection, advocates of the public domain note further that durational limitations on copyright are part of the constitutional scheme itself, just as various other limitations on rights have been recognized in American copyright jurisprudence from its inception. They draw from this the conclusion that proposed modifications to contemporary intellectual property law should be tested against the standard of how well and fully they preserve these traditional values.[14]

Notably, a counter-rhetoric has developed in response to advocacy of the public domain. Increasingly, advocates of longer, stronger and broader copyright protection take the position that the public domain is more an "information limbo" than an "informational commons," and that works in the public domain are likely to be lost

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[12] *See* § 5.01.

[13] *See also* Litman, *The Public Domain*, 39 Emory L.J. 965 (1990); Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain* (Pts. 1 & 2), 18 Colum.-VLA J.L. & Arts 1, 191 (1994-95).

[14] Kastenmeier & Remington, *The Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 Minn. L. Rev. 417, 422-23, 440-42 (1985).

to the public forever because no one has an economic incentive to exploit them.[15] In response, advocates of the public domain have begun to take up the challenge of explaining how, in concrete terms, the non-"propertyness" of some information actually promotes various good social and cultural ends.[16]

New economic rhetoric. The critique of the public domain advocacy just summarized represents an example of a relatively new strain in the discourse of copyright policy. By contrast, economic considerations have been part of the discussion from the beginning. With the rise of the "law and economics" movement in the United States, however, new claims are being made for the explanatory power of economic reasoning.

The traditional utilitarian rhetoric of copyright invokes economic concepts in its depiction of rewards to authors and distributors as incentives to make information goods available to the public. Incentive theory posits, as one observer has recently noted, "that copyright is necessary to prevent free riders from undermining the market in creative expression, notwithstanding a concern (usually) for 'copyright's social cost.' "[17]

Contemporary neoclassical economic theory, premised on faith in the power of the free market to allocate scarce resources, takes another, rather different approach, to the economic analysis of copyright. Under the neoclassicist approach, copyright is not so much a system of incentives to production and distribution of new works as it is a mechanism "for market facilitation, for moving existing creative works to their highest socially valued uses . . . by enabling copyright owners to realize the full profit potential for their works in the market."[18]

Unlike the economic analysis underlying traditional incentive rhetoric, neoclassical "property rights" theory is not vulnerable to the charge of indeterminacy. Broadly speaking, its proponents conclude that the more broadly rights are defined, and the fewer exceptions to which they are subject, the more likely market mechanisms are to fulfill the function of promoting the valuation of resources through the pricing system. Viewed from this perspective, concepts like fair use (except in particular cases of "market failure")[19] and the existence of a public domain are inherently inefficient. Indeed, the critiques of public domain advocacy

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[15] These arguments appear to stem, at least in part, from comments made by Irwin Karp during hearings leading up to the enactment of the Copyright Act of 1976. *See* House Comm. on the Judiciary, 88th Cong., 1st Sess., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: Discussion and Comments 316-17 (Comm. Print 1963).

[16] As Litman puts it, "The public domain [is] a device that permits the rest of the system to work by leaving the raw materials of authorship available for authors to use." *The Public Domain*, 39 Emory L.J. 968 n. 999 (1990). *See also* Jaszi, *Goodbye to All That — A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 Vand. J. of Transnat'l L. 595 (1996); Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines and New Arrangements of Public Domain Music*, 1996 Duke L.J. 241; and Hamilton, *An Evaluation of the Copyright Extension Act of 1995: Copyright Duration Extension and the Dark Heart of Copyright*, 14 Cardozo Arts & Ent. L.J. 655 (1996).

[17] Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 308-09 (1996).

[18] *Id.* at 309.

[19] *See, e.g.*, Landes & Posner, *An Economic Analysis of Copyright Law*, 18 J. Leg. Stud. 325 (1989).

outlined above can be seen, in part, as anticipations or applications of neoclassical "property rights" theory. The true vulnerabilities of neoclassical economic rhetoric, when applied to copyright law, lie elsewhere: in theory, with its central assumption that market mechanisms do in fact promote efficient allocation, and in practice, with the many examples of ways in which real markets diverge from the ideal.[20]

Despite its vulnerabilities, however, neoclassical rhetoric has acquired considerable currency in copyright discourse, especially with respect to rights in the new digital information environment.[21]

The rhetoric of social dialogue and democratic discourse. Discussions of the future of copyright law in cyberspace also have given prominence to a powerful new competing rhetoric in copyright discourse, in which the copyright system is figured as a mechanism for promoting certain core values of the civil society — such as openness, freedom, and diversity of expression — which have long been prominent in discussions of First Amendment jurisprudence and policy, but which are a relatively new focus of attention in the domain of intellectual property.[22]

One important source of this new rhetoric is the literature of political science, which recognized early on the liberatory potential of new international communications networks.[23] More recently, a number of scholars have argued specifically that the promotion of discourse in the civil society should be considered an important end of copyright policy in itself. Some have emphasized a perceived nexus between "social dialogue" and the creative process, arguing that if copyright is to fulfill its core cultural mission, it must reinforce rather than frustrate the elaboration of new communications technologies.[24] Others have stressed the structural function of copyright in maintaining the "independent expressive sector that is critical to democratic governance" — and which derives its independence from the fact that those who participate in it are supported by the market rather than being dependent on patronage or government largess.[25]

Whereas some exponents of this new rhetoric envision an electronically mediated space for social discourse which stands outside the commercial marketplace in

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[20] Netanel provides a good introduction to some of the critiques to which neoclassical theory is subject. 106 Yale L.J. at 332–36.

[21] *See generally* Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. Chi. Leg. F. 217.

[22] For a discussion of the marginalized position of the First Amendment in traditional copyright jurisprudence, see Chapter 9.

[23] *See especially* I. de Sola Pool, TECHNOLOGIES OF FREEDOM: ON FREE SPEECH IN AN ELECTRONIC AGE (1983).

[24] *See, e.g.*, Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DePaul L. Rev. 97 (1993); Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 Cardozo Arts & Ent. L.J. 345 (1995).

[25] *See* Netanel, *Copyright and a Democratic Civil Society* 106 Yale L.J. 283, 358-59 (1996); Radin, *Regulation of Computer and Information Technology: Property Evolving in Cyberspace*, 15 J.L. & Com. 509 (1996). For an historical argument that copyright law actually inhibited the development of civil discourse in the United States by "transforming printed texts from a practical means for assertive sociopolitical commentary into the more inert medium of property and commodity," see G. Rice, THE TRANSFORMATION OF AUTHORSHIP IN AMERICA 4 (1997).

information products, others believe that, if appropriately regulated, this marketplace itself could support the free, open, and diverse exchange which copyright was devised to promote. What both groups appear to share is a conviction that copyright exists, at least in part, to promote the collective life of society, and that mere reliance on an unregulated market in commodified expression will not necessarily further this end.

The rhetoric of "deference." In the judicial opinions you will read during this course, you also will encounter another characteristic set of arguments (or justifications) for results, which sound in a somewhat different key from those we have considered up to this point. Taken altogether, however, these arguments do constitute a "rhetoric" in their own right: the rhetoric of judicial deference. Copyright law issues are fact-intensive, so we you will not be surprised to see appellate courts deferring broadly to trial courts — although it also will be interesting to note the instances in which such deference is *not* afforded to determinations at trial. And copyright is, after all, a subject dominated by a complicated and detailed statute, so it is to be expected that judges sometimes will decline to second-guess Congressional judgments — even when there may be good arguments for doing so! We will encounter this aspect of the rhetoric of deference when (for example) we consider the Supreme Court's recent ruling on the constitutionality of copyright term extension, *Eldred v. Ashcroft*, 123 S.Ct. 769 (2003), in Chapter 5. But this isn't the whole story of judicial deference. We also will have opportunity to observe, from time to time, how federal courts give way to interpretations of the statute from other sources, especially the U.S. Copyright Office, in recognition of their "expertise." *See Marascalco v. Fantasy, Inc.*, 953 F.2d 469, 473 (9th Cir. 1991). So we will want to ask, as we go along, how profoundly the rhetoric of "deference" works to shape copyright doctrine and policy.

[D] Conclusion

Your study of the body of law called "copyright" is only beginning. As this book proceeds, we will revisit some of the ways of thinking and talking about copyright which have been summarized in the foregoing pages. You may already have strong opinions about which of those approaches you prefer. You may develop such preferences as you go along. All we ask is that, as you read through the chapters that follow, you bear in mind that mastering the ability to make (and answer) arguments using the various rhetorics just summarized will help make you a more effective advocate for copyright clients in the years to come.