

Chapter VII

Copyright, Commodification, and Culture: Locating the Public Domain

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1. COMMODIFICATION AND THE PUBLIC DOMAIN: FOUR PUZZLES

The relationship between increased commodification and the public domain in copyright law is the subject of considerable controversy, both political and theoretical. Critics of commodification, for the most part academics and artists, assert that the inexorable expansion of copyright rights threatens the continued viability of a robust public domain. Proponents of this expansion, including representatives of the large copyright industries but also some academics, have two responses. First, they assert that commodification promotes greater public access to expressive works; that is, after all, the whole point. Second, they argue that the claimed nexus between commodification and the public domain is in fact a *non sequitur*: more perfect commodification of information that is currently copyrighted in no way undermines public access to and use of information that is not.

This debate has a curious quality. At first examination, the parties seem to be talking past each other. One side posits a powerful inverse relation between the proprietary and the public, while the other side does not seem to think it is necessary, when evaluating the practical and theoretical desirability of commodification, to talk about the public domain at all.¹ On closer inspection, however, the position staked out by proponents of commodification also rests on a set of implicit claims about

1. In reality, of course, each side encompasses a spectrum of positions. Not everyone in the former group supports all measures that would weaken copyright, and not everyone in the latter group supports all measures that would strengthen it. In general, I will use 'pro-commodificationist' to refer to those who believe that copyright should be long and strong and 'anti-commodificationist' to refer to those who believe that it is too long and too strong already.

the nature and function of the public domain. But the pro-commodificationists and the anti-commodificationists do not understand the public domain the same way.

Four puzzles illustrate this gap in perception:

The first puzzle concerns copyright duration. Observing that every year added to the term of copyright is a year withheld from the public domain, anti-commodificationists argue that such extensions represent a threat to the public domain that is clear and direct. For pro-commodificationists, this is not an argument against commodification, but one that overlooks its considerable benefits. They observe that the copyright system is intended not only to stimulate creativity, but also to promote public access to creative works. Term extension, which enables additional years of productive use for older works, serves the latter purpose. More generally, they note that the existing public domain is, after all, quite large; how can extending the terms of current copyrights, which are not 'in the public domain,' threaten what is already 'there'?

The second puzzle concerns the exemptions, or privileges, that users of copyrighted works traditionally have enjoyed under copyright's system of limited exclusive rights. More perfect commodification requires narrowing and possibly eliminating some or all of these privileges. Anti-commodificationists argue that this narrowing will disrupt the proper balance between the proprietary and the public. Implicitly, then, and sometimes explicitly, they claim that copyright's system of exemptions and user privileges forms part of the public domain.² Although many adherents of commodification support retaining particular user privileges, they do not understand this argument. Copyrighted works, self-evidently, are not 'in the public domain,' so how can uses of them be?

The third puzzle concerns copyrightable subject matter. Within the last three decades, the dynamic of commodification has supported the extension of copyright protection to a variety of materials, including computer program interfaces, statistical indices, taxonomies, and artistic styles. Citing the truism that copyright does not extend to ideas, facts, systems, procedures, or methods of operation, the anti-commodificationists argue that these extensions amount to improper appropriation of the public domain building blocks of knowledge and creative expression. Pro-commodificationists find this claim curious. How can these things be 'in the public domain' when they are concrete expressions of more general ideas and were only recently brought into being?

The final puzzle concerns the effect of Digital Millennium Copyright Act's (DMCA) anti-device provisions on the public domain. More perfect commodification requires more perfect control over access to copyrighted works. The DMCA seeks to strengthen such control by prohibiting the tools that one might use to evade

2. For examples of explicit claims, see Y. Benkler, 'Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain', 74 *N.Y.U. L. Rev.* 354-445 (1999), p. 393 (arguing that the public domain encompasses those fair use entitlements that are clear and universally applicable), and P. Samuelson, 'Mapping the Digital Public Domain: Threats and Opportunities', 66 *L. & Contemp. Probs.* 147-171 (2003) (describing fair use as a 'contiguous territory' to the public domain).

control. Anti-commodificationists object to this broad prohibition, in part because it allows technical protection systems to override user privileges, and in part because it frustrates public access to public domain content that is subject to technical protection. They assert that the DMCA effectively removes this content from the public domain. Here again, the pro-commodificationists profess themselves bewildered. As long as the content is available somewhere in non-copy-protected form, how can its publication in copy-protected form threaten the public domain? How can you 'remove' a work from the public domain when it's already 'there'?

The exact location of the dividing line between the proprietary and the public is formally a question of policy, but these puzzles suggest that metaphorically-driven conceptions of what a 'public domain' is, and what it is not, play an important role in determining the answer.³ To evaluate the effects of increased commodification on the public domain, and on the flow of information more generally, we may first need to examine more closely the extent to which the metaphor of a 'public domain' itself shapes assumptions about which aspects of artistic, intellectual, and informational culture⁴ are public. I will argue that the metaphor in fact describes the public aspects of such culture rather badly.

Part 2 traces the history of the public domain metaphor in US copyright law. It argues that, when considered in broader historical context, the term 'public domain' has a specific set of denotative and connotative meanings that constitute the artistic, intellectual, and informational public domain as a geographically separate place, portions of which are presumptively eligible for privatization. This idea meshes well with the push toward commodification, and is one of the reasons that the pro-commodificationist interpretation of the relationship between the proprietary and the public has proved so robust.

Part 3 tests this metaphorical construct of the public domain against descriptive and theoretical accounts of the ways that forms of artistic expression develop. The theoretical models of creativity that dominate copyright discourse do not adequately acknowledge the contingent, socially embedded nature of creative processes. Creative practice is opportunistic, indiscriminate and centrally dependent on the borrowing and reworking of encountered objects and techniques. Creative practice is also

3. Some legal scholars argue that, at least in the US, the Constitution dictates a specific structure for the public domain. This paper takes no position on that subject; its goal simply is to interrogate the extent to which one's views about the appropriate legal definition of the public domain depend on what one imagines a 'public domain' to be. For a summary of the literature addressing the constitutional questions, see D. Leenheer Zimmerman, 'Is There a Right to Have Something to Say? One View of the Public Domain', 73 *Fordham L. Rev.* 297-376 (2004).

4. The meaning and appropriate uses of the term 'culture' are hotly contested among anthropologists and sociologists. See, e.g., C.M. Kelty, 'Punt to Culture', in C.M. Kelty (ed.), *Culture's Open Sources: Software, Copyright, and Cultural Critique*, 77 *Anthropological Q.* 547-558 (2004); N. Mezey, 'Law as Culture', 13 *Yale. J.L. & Hum.* 35-67 (2001). I do not mean to take sides in that debate, nor to suggest that law is somehow external to culture; to the contrary, I argue that the two are entangled. As Kelty acknowledges, sometimes one simply needs a word to use. Here, I use the terms 'culture' and 'artistic culture' as shorthand for the universe of artistic, intellectual, and informational artifacts and practices.

fundamentally contextual, social and relational. Constructing a theoretical model of creativity that takes adequate account of these aspects of creative practice requires not an economics or a biology of creativity, but rather a sociology. Attention to the social parameters of creative practice suggests an understanding of the development of artistic culture that is quite different from that implicit in the pro-commodificationist model. The common in culture⁵ is not a separate place, but a distributed property of social space. If we as a society want to facilitate the development of artistic culture, copyright doctrine should recognize rights of access to the common in culture to a far greater extent than it currently does.

Part 4 offers a different organizing metaphor for the relationship between the public and the proprietary that matches the theory and practice of creativity more accurately: The common in culture is not a geographically separate domain, but rather the cultural landscape within (and against and through) which creative practice takes place. When this is acknowledged, the other half of the ‘public domain’ metaphor also dissolves. Just as the cultural landscape is not geographically separate, so it is not comprised only of materials that are ‘public’ in all respects. This in turn suggests a need to recalibrate the doctrines that determine the scope of a copyright owner’s rights during the copyright term, particularly those that establish the right to control the preparation and exploitation of copies and derivative works.

2. THE CONSTRUCTION OF THE PUBLIC DOMAIN: A BRIEF HISTORY OF AN IDEA

What modern models of the public domain have in common is an implicit understanding of the public domain as a geographically separate preserve encompassing the old, the archetypal, and the unproductive. This understanding is neither necessary nor inevitable, and may not have been intended by those who first adopted the term to refer to aspects of culture that are commonly owned. It is, instead, the product of a historical contingency: our understanding of the common in culture has become deeply rooted in the preexisting history of the term ‘public domain’ in US public land law. This territorially-determined vision of the public domain enables pro-commodificationists to assert, quite truthfully from their perspective, that commodification has no effect on the public domain whatsoever, and disables anti-commodificationists from mounting an effective challenge.

5. I use this term provisionally to designate those aspects of artistic culture that are common in the experiential rather than the legal sense.

2.1. FROM PUBLIC PROPERTY AND PUBLICI JURIS TO PUBLIC DOMAIN

The metaphoric notion of a ‘public domain’ in US copyright law did not exist until the turn of the twentieth century. As Tyler Ochoa and Edward Lee have described, nineteenth-century American courts used the terms ‘public property,’ ‘common property,’ and *publici juris*, which translates loosely as ‘of public right,’ to refer to both noncopyrightable and nonpatentable subject matter.⁶ In the late nineteenth century, the term ‘public domain’ began to appear occasionally in patent decisions (of which more later); within the space of a few decades, it had become standard nomenclature in both copyright and patent cases.

The emergence of the term ‘public domain’ in US intellectual property law seems to have been prompted by two developments, one judicial and one legislative. The judicial development involved a novel type of legal claim concerning the subject matter of expired patents and copyrights. The basic fact pattern was this: a patented/copyrighted item was sold under a trade name that became well-known to the public. Following expiration of the patent/copyright, the patentee/copyright holder invoked unfair competition laws to prevent would-be competitors from referring to the item by its well-known name. Without exception, the courts rejected these claims, reasoning that any other result would frustrate the public’s right to make and sell the items, and would thereby enable the creation of perpetual monopolies. The line of cases concerning the patent/trademark interface included two Supreme Court opinions that remain prominent to this day.⁷ The copyright/trademark cases, which are less familiar to modern readers, involved efforts by the publishers of *Webster’s Dictionary* to prevent competitors from using that renowned title to market their own editions of the work.⁸

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6. E. Lee, ‘The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access Through Secrecy or Intellectual Property’, 55 *Hastings L.J.* 91-209 (2003), p. 102; T.T. Ochoa, ‘Origins and Meanings of the Public Domain’, 28 *U. Dayton L. Rev.* 215-266 (2002), pp. 258-259; see, e.g., *Baker v. Selden*, 101 U.S. 99, 100-101 (1879) (‘common property’); *Evans v. Eaton*, 20 U.S. 356, 425 (1822) (‘public property’); *Lawrence v. Dana*, 15 F. Cas. 26, 52 (D. Mass. 1869) (‘public property’); *Stowe v. Thomas*, 23 F. Cas. 201 (E.D. Pa. 1853) (*publici juris*); *Thompson v. Haight*, 23 F. Cas. 1040, 1047 (S.D.N.Y. 1826) (‘public property’ and *publici juris*).
 7. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896).
 8. *Ogilvie v. G. & C. Merriam Co.*, 149 F. 858 (D. Mass. 1907), *aff’d*, 159 F. 638 (1st Cir. 1908); *G. & C. Merriam Co. v. Straus*, 136 F. 477 (S.D.N.Y. 1904); *Merriam v. Famous Shoe & Clothing Co.*, 47 F. 411 (E.D. Mo. 1891); *Merriam v. Holloway Publ’g Co.*, 43 F. 450, 451 (E.D. Mo. 1890); see also *G. & C. Merriam Co. v. Syndicate Publ’g Co.*, 237 U.S. 618 (1915) (rejecting belated attempt to claim trademark protection for the name ‘Webster’). *But cf. Ogilvie*, 149 F. at 864 (ordering defendants to rewrite their advertising circulars to cure the misleading impression that they were affiliated with the original publisher); *aff’d*, 159 F. 638 (1st Cir. 1908); see also *G. & C. Merriam Co. v. Saalfeld*, 198 F. 369 (6th Cir. 1912) (later proceeding addressing *Ogilvie* defendant’s noncompliance with remedial order); *Merriam v. Texas Siftings Publ’g Co.*, 49 F. 944

The two earliest decisions in the *Webster's Dictionary* litigation followed existing convention and referred to the subject matter of the expired copyright more abstractly as 'public property.' By chance, one of these decisions was authored by Supreme Court Justice Samuel Miller, who happened to draw the case while sitting as circuit judge for the Eastern District of Missouri. Justice Miller reasoned: 'When a man takes out a copyright, for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property. I may be the first to announce that doctrine, but I announce it without any hesitation... . [A]fter the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book.'⁹ For Justice Miller, the 'public property' formulation indicated that dedication to the public was irrevocable, and could not be avoided by layering additional rights on top of those conveyed in the time-limited grant of copyright. As already noted, Justice Miller was not in fact the first to use 'public property' in this way, but he was by far the most prominent, and under other circumstances his decision and the terminology it employed might have played a foundational role in modern intellectual property law.¹⁰ Justice Miller died less than one month later, however, and was not there to participate when a similar question finally reached the Supreme Court.

In 1896, the Supreme Court decided *Singer Manufacturing Co. v. June Manufacturing Co.*,¹¹ and shifted the legal terminology in a different direction. The case concerned the eligibility of the name 'Singer' for protection following expiration of the Singer Manufacturing Company's patents on its sewing machines. The Court quoted Justice Miller's discussion of 'public property,' and then went on, via a lengthy discussion of US, British, and French law regarding the subject matter of expired patents, to link that concept to the idea of a 'public domain' in which such property resided. It concluded: 'the word 'Singer,' as we have seen, had become public property, and ... it could not be taken by the Singer Company out of the public domain by the mere fact of using that name as one of the constituent elements of a trade-mark.'¹² The term 'public property' appears in the *Singer* opinion seven times; the term 'public domain,' ten times. After *Singer*, courts gradually began to adopt the new terminology, although they continued to use the older terminology as well.

The legislative impetus for widespread adoption of 'public domain' in US intellectual property law was the enactment of the 1909 Copyright Act. Section 7 of the new law expressly excluded copyright protection for 'works in the public domain.'¹³

(S.D.N.Y. 1892) (earlier proceeding involving misleading resale of books published by *Ogilvie* defendant).

9. *Holloway Publ'g Co.*, 43 F. at 451.

10. Two of his earlier opinions continue to play such a role. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *The Trade-Mark Cases*, 100 U.S. 82 (1879).

11. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 203 (1896).

12. *Singer Mfg. Co.*, 163 U.S. at 203.

13. Copyright Act of 1909, ch. 320, § 7, 35 Stat. 1075, 1077 (1909); see also *id.* § 6 (extending copyright protection to compilations, adaptations 'or other versions of works in the public domain').

The legislative history of the Act contains no explanation for this provision, which evidently was not considered at all controversial.

As courts began to reason in terms of a 'public domain,' the other designations were gradually set aside.¹⁴ As Ochoa describes, another prominent jurist, Learned Hand, who sat on what was fast becoming the most influential copyright court in the country, played an important role in this process.¹⁵ Courts deciding copyright cases adopted the term 'public domain' not only to describe works for which copyright protection had expired or been forfeited, but also to refer to elements of copyrighted works that could not themselves be protected by copyright.¹⁶

Intellectual property scholars have identified the concept of an intellectual 'public domain' as a European import. Both Jessica Litman and James Boyle note its adoption in the Berne Convention, where it was derived from the French concept of *domaine public*.¹⁷ That is undoubtedly the most plausible explanation for section 7 of the 1909 Act, since the legislative history of the Act contains extensive discussion of European rules on copyright duration and other matters. It does not seem unreasonable to posit that Congress also was aware of the Supreme Court's prominent decision in *Singer*, which was cited as a leading authority in a number of post-1896 copyright cases. Explanations for the *Singer* Court's reference to the public domain turn again to Europe. Both Lee and Ochoa trace the term to French intellectual property treatises and decisions, a number of which the Court quoted at length.¹⁸

I am inclined to think that these explanations are absolutely right, yet they do not go far enough. At the time of its adoption by the *Singer* Court and the 1909 Congress, the term 'public domain' already existed in US law, where it had a distinct and very different meaning.

2.2. PUBLIC DOMAIN, PUBLIC PROPERTY, AND PUBLICI JURIS IN NINETEENTH-CENTURY US LAW

The earliest appearance of the term *public domain* in US law is not in patent or copyright law at all but rather in connection with the disposition of publicly owned

14. For quantitative documentation of the shift, which spanned the first half of the twentieth century, see Ochoa, *supra* note 6, at pp. 242-246.

15. See Ochoa, *supra* note 6, at pp. 243-244.

16. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930); *Maddux v. Grey*, 43 F.2d 441 (S.D. Cal. 1930); *Alexander v. Theatre Guild*, 26 F.2d 741 (S.D.N.Y. 1927); *Int'l Film Serv. Co. v. Affiliated Distributors*, 283 F. 229 (S.D.N.Y. 1922); *Stodart v. Mutual Film Corp.*, 249 F. 507 (S.D.N.Y. 1917).

17. J. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', 66 *L. & Contemp. Probs.* 33-74 (2003), at p. 58; J. Litman, 'The Public Domain', 39 *Emory L.J.* 965-1023 (1990), at p. 975 n. 60.

18. *Singer Mfg. Co.*, 163 U.S. at 186, 196-99, 203 (1896); see Lee, *supra* note 6, at pp. 13-14 & n. 66; Ochoa, *supra* note 6, pp. 241-242.

lands.¹⁹ I will therefore call this first model of the public domain in US law the *public lands* model. Although the public lands model had nothing to do with intellectual creations, it established a template for the jurisprudential concept of the public domain that influences debates about the public domain in copyright law to this day.

Public land law in the US traces its origins to a political struggle among the original thirteen states of the new nation. Under pressure from their relatively landless peers, states that claimed title to large tracts of western land gradually ceded title in those lands to the newly-created federal government.²⁰ The government, in turn, established and administered procedures for surveying 'public domain' lands and transferring them to private buyers, and later oversaw the admission to the union of new states constituted out of the federally administered territories. During the first two-thirds of the nineteenth century, the federal government acquired additional large tracts of land, beginning with the Louisiana Purchase in 1803, and ending with the Alaska Purchase in 1867. It extended the privatization process to new lands as they were acquired.²¹

This process of gradual privatization of public domain lands engendered repeated debates between those who believed that the primary goal should be maximization of revenue and those who believed that the primary goal should be the transfer of lands to productive use.²² In particular, some in this latter group argued that privatization efforts should give priority to squatters already in possession, and should be structured to prevent large-scale land speculation. At times, the land speculators prevailed; at other times, for a variety of reasons, the politics of privatization yielded policies that were more populist.

The public lands model of the public domain thus rested upon four basic principles. First, public domain lands are geographically separate places that may be surveyed, charted, and divided into manageable parcels. Second, public domain lands are not subject to direct private appropriation. Third, and notably, this does not mean that nobody owns these lands, nor does it mean that they may not become privately owned. It simply means that their transfer to private ownership must proceed according to the rules instituted by their current owner, the sovereign. Fourth, this

19. Both Litman and Boyle acknowledge this usage of public domain, but do not pursue it. Ochoa also acknowledges the public lands model of the public domain, but argues that the concept of the public domain employed in intellectual property cases was simply different. Ochoa, *supra* note 6, at 258-259. As this section discusses, I think that conclusion is too hasty, and ignores the power of metaphor to shape meaning.

20. See D. Feller, *The Public Lands in Jacksonian Politics*, Madison (Wis.), University of Wisconsin Press, 1984, pp. 3-6.

21. For representative histories of US public land law and policy, see *id.*; D. Friedenberg, *Life, Liberty and the Pursuit of Land*, Buffalo, Prometheus Books, 1992; B. Hibbard, *A History of the Public Land Policies*, (1924), Madison (Wis.) reprint 1965; R. Robbins, *Our Landed Heritage* (1942), reprint Lincoln, University of Nebraska Press, 1962.

22. See Feller, *supra* note 20; Hibbard, *supra* note 21, at pp. 347-352; P.W. Gates, *The Jeffersonian Dream: Studies in the History of American Land Policy and Development*, Albuquerque, University of New Mexico Press, 1996, pp. 40-45; Robbins, *supra* note 21.

process affords both a testing ground for social and economic policy and a point of entry for more narrowly motivated rent-seeking.

The terms ‘public property,’ ‘common property,’ and *publici juris* also did not come from nowhere, but had a wider range of meanings outside of the intellectual property context. The designation ‘public property’ was applied to publicly owned land, buildings and durable goods, but also to a number of other matters including official records and publicly known information.²³ ‘Common property’ meant property owned by two or more persons, but also natural resources in which the public (or at least adjoining landowners) acquired vested rights.²⁴ The range of meanings attached to *publici juris* was even more varied. In some cases, it referred to un-owned or abandoned property, ‘open to location by the first comer.’²⁵ In other cases, it was a synonym for ‘common property’ in natural resources.²⁶ Relatedly, *publici juris* sometimes referred to common resources, such as roads or bridges, regulated by the state for the general public benefit. The state might grant franchises to private entities to manage such resources, but these grants remained subject to public supervision in order to preserve public rights of access.²⁷ In still other cases, it referred more generally to matters of public law, as distinct from private law.²⁸ In the latter three groups of cases, the label *publici juris* signaled that a case could not be decided simply by weighing the competing claims of private parties.

Lee argues that the shift to the single term ‘public domain’ marked the emergence of a mature, robust conception of noncopyrightable and copyright-expired material as inalienable public property. When the complex constellation of meanings associated with the earlier terms is juxtaposed with the narrower set of meanings associated with the term ‘public domain,’ that conclusion seems questionable. The shift in terminology is a significant one, but probably not for the reasons that Lee suggests. In different ways, ‘public property,’ ‘common property,’ and *publici juris* all denoted matters affecting the rights of and relations between citizens in society, while ‘public domain’ served largely as a holding device for land destined for privatization.

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23. See, e.g., *State v. Patton*, 64 N.W. 922 (Minn. 1895) (land surveys conducted by country surveyor); *Billingsley v. Clelland*, 41 W. Va. 234 (W. Va. 1895) (generally known information about individuals); *Dunham v. State*, 6 Iowa 245 (Iowa 1858) (judicial decisions).
 24. See, e.g., *Field v. Barling*, 37 N.E. 850 (Ill. 1894) (light and air above a public road); *State v. Black River Phosphate Co.*, 13 So. 640 (Fla. 1893) (navigable waters and their shores).
 25. See, e.g., *Derry v. Ross*, 5 Colo. 295 (Colo. 1880) (mining claims).
 26. See, e.g., *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 23 (1885) (flowing water).
 27. See, e.g., *Raleigh & Gaston R. Co. v. Davis*, 19 N.C. 451 (N.C. 1837) (public roads); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. 344 (Mass. 1829) (ferries and bridges).
 28. See, e.g., *Maguire v. Maguire*, 37 Ky. 181, 183-184 (Ky. App. 1838) (‘Marriage ... unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And therefore ... [it] is regulated and controlled by the sovereign power of the State, and cannot, like *mere contracts*, be dissolved by the mutual consent only of the contracting parties....’).

The *Singer* Court and the Congress of 1909 may not have meant to invoke the established meaning of ‘public domain’ in US real property law.²⁹ For most lower court judges and most US-trained lawyers, though, matters probably were not quite so clear. As noted earlier, the term ‘public domain’ had seen sporadic use in patent cases before *Singer*. It is worth examining the two reported cases more closely. As used in those cases, ‘public domain’ appears to mean something slightly narrower than ‘public property,’ ‘common property,’ or *publici juris*. Nineteenth-century courts used the latter three terms to describe both material for which patent or copyright protection had expired and material definitionally ineligible for protection. Thus, for example, the earliest reported use of *publici juris* in an intellectual property case concerned insufficient novelty; the claimed invention could not be patented, reasoned the court, because it had always belonged to the public.³⁰ ‘Public domain,’ in contrast, was applied in the two reported patent cases before *Singer* to describe the status of an invention at the end of the patent’s life, an event that could be delayed by surrender of an initial, broad patent and reissue of subsequent, narrower patents.³¹ Cross-citation of patent cases in public lands cases and vice versa, moreover, was common. The document transferring title to land formerly part of the public domain was also called a patent, and courts seeking to develop a body of law concerning one subject often turned to the other for guidance.³²

In this context, it is noteworthy that the concepts of ‘public property,’ ‘common property,’ and *publici juris* did not disappear from the intellectual property lexicon

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29. Ochoa argues persuasively that the *Singer* Court did not intend this. Ochoa, *supra* note 6, at pp. 240-242, 257. My concern here, however, is with the intellectual history of the term, not with the proper interpretation of precedent.
30. *Thompson v. Haight*, 23 F. Cas. 1040, 1047 (S.D.N.Y. 1826); *see also Wall v. Leck*, 66 F. 552, 556 (9th Cir. 1895) (‘A principle, considered as a natural physical force, is not the product of inventive skill. It is the common property of all mankind.’); *see also Carr v. Rice*, 5 F. Cas. 140, 143 (S.D.N.Y. 1856) (invention ‘previously in public use’ is ‘public property, and the law does not permit it to be appropriated, by means of a patent grant, to individuals’).
31. *Brush Elec. Co. v. Elec. Accumulator Co.*, 47 F. 48, 56 (S.D.N.Y. 1891) (reasoning that the expiration of Italian patent rights ‘threw the invention into the public domain’ only in Italy, but that the corresponding US patent and a subsequent improvement patent remained in force in the US); *Wheeler v. McCormick*, 29 F. Cas. 905, 909 (S.D.N.Y. 1873) (‘I am of the opinion that nothing fell into the public domain, on the expiration of [one reissued patent stemming from the surrender of a broader patent], except the special device claimed in it, and that that patent did not include the devices embraced in the other reissues upon which the suit is brought.’).
32. *See, e.g., Marsh v. Nichols, Shepherd & Co.*, 128 U.S. 605, 610 (1888); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 281 (1888); *United States v. American Bell Tel. Co.*, 128 U.S. 315, 358-59 (1888) (‘[T]here is a striking similarity in the language of that instrument conferring the power upon the government under which patents are issued for inventions, and patents are issued for lands.’) (comparing US Const. Art. I, § 8, cl. 8, and id. Art. 4, § 3, cl. 2); *Providence Rubber Co. v. Goodyear*, 76 U.S. 788, 797-98 (1869) (‘[A]s regards the point here under consideration, there is no distinction between such a [land] patent and one for an invention or discovery.’); *Pontiac Knit Boot Co. v. Merino Shoe Co.*, 31 F. 286, 289 (D. Me. 1887); *United States v. Colgate*, 21 F. 318, 318 (S.D.N.Y. 1884); *Consolidated Fruit-Jar Co. v. Wright*, 94 U.S. 92, 96-97 (1877) (‘A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions.’).

immediately. Well into the mid-twentieth century, courts continued to use both terms, with some differences in application. Words, facts, ideas, and preexisting knowledge were public property, common property or *publici juris*, as were materials published without satisfaction of copyright formalities or patent eligibility requirements.³³ Works no longer protected by copyright or patent were in the public domain;³⁴ the designation was first extended to other categories, such as stock characters or plot elements within copyrighted works, principally via the efforts of Learned Hand and a few of his colleagues, including his cousin Augustus Hand.³⁵ The initial division of responsibility seems to correspond roughly to that between natural

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33. See, e.g., *Alexander-Milburn Co. v. Davis-Bournonville Co.*, 46 U.S. 324 (1926) (unclaimed matter disclosed in patent application or any other publication is ‘public property’); *Berlin Mills Co. v. Procter & Gamble Co.*, 41 U.S. 75 (1920) (technical subject matter lacking novelty is ‘public property’); *International News Service v. Associated Press*, 248 U.S. 215, 219 (1918) (‘[T]he news element ... is not the creation of the writer, but is a report of matters that are ordinarily *publici juris*; it is the history of the day.’); id. at 235 (‘[T]he news of current events may be regarded as common property.’); *Holmes v. Hurst*, 174 U.S. 82 (1899) (copyright does not protect words, which are ‘common property of the human race,’ but only the arrangement of words); *Affiliated Enters. v. Gruber*, 86 F.2d 958 (9th Cir. 1936) (idea disclosed to the public without patent protection becomes ‘public property’); *Chautauqua School of Nursing v. National School of Nursing*, 238 F. 151 (2d Cir. 1916) (medical knowledge discussed in nursing textbooks was ‘common property’); *Snow v. Laird*, 98 F. 813 (7th Cir. 1900) (photograph published without satisfaction of copyright formalities became ‘public property,’ and author could not reclaim it by making subsequent changes to the negative); see also *Ferris v. Frohman*, 223 U.S. 424 (1912) (play copyrighted in Britain did not become ‘public property’ in the US upon its performance in Illinois because performance was not a ‘publication’); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (images drawn from nature were not for that reason ‘common property’); *London v. Biograph Co.* 231 F. 696 (2d Cir. 1916) (characterizing stock plot elements with pedigree extending back to Chaucer as ‘common property’).
34. See, e.g., *Brady v. Reliance Motion Picture Corp.*, 232 F. 259 (S.D.N.Y. 1915) (breach of trust by trustee of dramatic rights in motion picture did not release the rights to the public domain); *Union Special Mach. Co. v. Maimin*, 185 F. 120 (C.C.E.D. Pa. 1911) (fact that component parts of combination had ‘fallen into the public domain’ did not preclude patent protection for combination); see also *Metals Recovery Co. v. Anaconda Copper Mining Co.*, 26 F.2d 736 (D. Mont. 1928) (‘The object of the statute is ... to show how much of the public domain is segregated for the benefit of the patentee.’).
35. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (L. Hand, J.) (plaintiff’s ‘copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain’), *aff’g Nichols v. Universal Picture Corp.*, 34 F.2d 145 (S.D.N.Y. 1929) (‘fundamental plot’ of play is ‘common property in the “public domain”’); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924) (L. Hand, J.) (copyright for song not precluded by the fact that a similar or identical work ‘independently appeared before it and is in the public domain’); *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932 (S.D.N.Y. 1921) (L. Hand, J.) (directory could be copyrighted even though its constituent elements were in the public domain); *McCarthy & Fischer v. White*, 259 F. 364 (S.D.N.Y. 1919) (A. Hand, J.) (‘Only a publication of the manuscript will amount to an abandonment of the rights of the author and a transfer of them to the public domain.’); *Stodart v. Mutual Film Corp.*, 249 F. 507 (S.D.N.Y. 1917) (L. Hand, J.) (plot of an old story was in the public domain, but that did not preclude copyright for variations in new version); *Fitch v. Young*, 230 F. 743 (S.D.N.Y. 1916) (L. Hand, J.) (since then-applicable version of Copyright Act did not confer right to ‘novelize’ a play, right was in public domain).

law and positive law: words and facts were considered to be fundamentally public in character, while copyrighted works entered the public domain by operation of specific, policy-driven rules.

Gradually, however, the older terminology fell into disuse in intellectual property law. In contemporary opinions that address the boundary between the proprietary and the public, there is only the public domain. The latter term has recently become the focus of tremendous scholarly interest.

2.3. THE PUBLIC DOMAIN IN CONTEMPORARY COPYRIGHT LAW

There are two competing models of the public domain in contemporary copyright law. One, which I will call the *conservancy* model, aligns substantially with the anti-commodificationist position described above. The other, which I will call the *cultural stewardship* model, aligns substantially with the pro-commodificationist position. Both of these models trace their origins to an academic debate about the nature of the public domain that began in the late twentieth century.

The resurgence of interest in the public domain in contemporary copyright scholarship is generally agreed to begin with a provocative article published in 1981 by David Lange.³⁶ Observing that ‘the growth of intellectual property in recent years has been uncontrolled to the point of recklessness,’³⁷ Lange pressed the case for affirmative acknowledgment of the public domain. Lange was primarily concerned with the emergence of new rights of publicity and unfair competition; in those cases, he argued, the public domain should be the presumptive baseline and new rights should be strictly circumscribed. More generally, however, he characterized the public domain as a matter of public right, rather than simply the negative or obverse of intellectual property, and urged the development of a general theory to explain what the public’s rights encompassed.

Lange’s article was followed, in 1990, by an influential article authored by Jessica Litman.³⁸ Litman sought both to identify the constituent elements of the public domain and to synthesize these elements into a coherent theory that would explain the public domain’s purpose. According to this theory, the public domain both mediates and enables the concept of originality in copyright law. Without the idea of a public domain to buffer claims of originality, attempts to substantiate these claims would present problems of infinite regress. The public domain is the

36. D. Lange, ‘Recognizing the Public Domain’, 44 *L. & Contemp. Probs.* 147 (1981). A number of earlier writers had begun to question the centrality of copyright to the production of artistic culture, including B. Kaplan, ‘An Unhurried View of Copyright: Proposals and Prospects’, 66 *Colum. L. Rev.* 831 (1966), L. Ray Patterson, *Copyright in Historical Perspective*, Nashville, Vanderbilt University Press, 1968; and S. Breyer, ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs’, 84 *Harv. L. Rev.* 281-355 (1970); see also R.S. Brown, ‘Advertising and the Public Interest: Legal Protection of Trade Symbols’, 57 *Yale L.J.* 1165-1206 (1948).

37. *Id.* at p. 147.

38. Litman, *supra* note 17.

negative pregnant that enables authors, and the copyright system more generally, to demarcate what can feasibly be characterized as the product of individual authorship. Litman argued, though, that new works ‘inevitably echo[] expressive elements of prior works.’³⁹

Until the mid-1990’s, this discussion about the nature of the public domain was largely confined to the pages of law journals, and not all scholars were equally convinced of its importance.⁴⁰ In particular, the more complex normative claims advanced by Lange and Litman, and the dynamic conception of the public domain that those claims dictated, received relatively little attention from policymakers.⁴¹ In 1995, however, the U.S. Congress began debating proposals for legislation that would extend the duration of both subsisting and future copyrights by an additional twenty years. This legislation, ultimately adopted in 1998 as the Sonny Bono Copyright Term Extension Act,⁴² galvanized vigorous opposition. The nature of the public domain, and the ways in which the composition of the public domain changes over time in response to other changes in copyright law, rapidly became matters of pressing importance.

Out of the debates surrounding term extension, and copyright expansion more generally, two distinct visions of the public domain in copyright have emerged, which correspond broadly to the anti-commodification and pro-commodification positions described above. Both models are dynamic; that is, they attempt to describe changes in the content and composition of the public domain over time, and to evaluate the effects of these changes for society more generally. Where the two models part company is in their normative assessment of the public domain and its role within the overall copyright system.

The first of these dynamic models, the conservancy model, is identified with the work of Litman, Yochai Benkler, James Boyle, Pamela Samuelson, Lawrence Lessig, J.H. Reichman and others, and builds directly on Lange’s and Litman’s earlier work.⁴³ Broadly speaking, this model is concerned both with ensuring the continued

39. Id. at p. 1008.

40. See, e.g., E. Samuels, ‘The Public Domain in Copyright Law’, 41 *J. Copyright Soc’y* 137-182 (1993).

41. But see: R.W. Kastenmeier and M.J. Remington, ‘The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?’, 70 *Minn. L. Rev.* 417-470 (1985), pp. 438-442 (advocating a ‘political test’ for new intellectual property legislation that would include consideration of whether and how the legislation ‘will enrich or enhance the aggregate public domain’) (citing *Copyright and Technological Change: Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess., 65-66 (1983) (statement of David Lange, Professor of Law, Duke University)).

42. Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 105th Cong., 2d Sess. (1998), codified at 17 U.S.C. §§ 302-304.

43. L. Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, New York, Random House/Vintage, 2001; J. Litman, *Digital Copyright*, Amherst, Prometheus Books, 2001; Y. Benkler, ‘Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain’, 66 *L. & Contemp. Probs.* 173-224 (2003); Benkler, *supra* note 2; Boyle, *supra* note 17; J.H. Reichman and P.F. Uhlir, ‘Promoting Public Good Uses of Scientific Data: A Contractually Reconstructed Commons for Science and Innovation’, 66 *L. & Contemp. Probs.*

growth of the public domain and with protecting the existing public domain against incursions. Conservancy theorists view recent expansions of copyright as damaging to patterns of information flow within the copyright system generally.

According to proponents of the conservancy model, recent legislative expansions of copyright are best described as series of unprincipled land grabs, or enclosures, by powerful domestic industries. They argue, moreover, that the CTEA was not the first such land grab, but simply the logical continuation of a process stretching back at least to the comprehensive revision of the copyright laws that began in 1964 and culminated in the Copyright Act of 1976. In particular, they point to a series of changes in the rules governing copyright subsistence and duration that were intended primarily to bring US copyright law into line with copyright law in the rest of the developed world, and that replaced idiosyncratic rules much more hospitable to the public domain. Proponents of the conservancy model also identify as land grabs a series of other efforts to extend copyright protection and/or other intellectual property protection to a variety of nontraditional subject matters, including databases and computer software.

The second dynamic model of the public domain, the cultural stewardship model, acknowledges all of these changes, but paints them in quite a different light. According to this model, continued ownership of copyright enables productive management of artistic and cultural subject matter. Passage into the public domain should occur only after the productive life of a cultural good has ended, and is to be mourned, not celebrated. The metaphor of 'falling' into the public domain, popularized by adherents of the cultural stewardship model (and too often adopted uncritically by adherents of the conservancy model as well) conveys this sense of loss and waste. Not surprisingly, this model claims numerous adherents among representatives of the major copyright industries. Within the academic literature, it is most prominently identified with the work of William Landes and Richard Posner.⁴⁴

Adherents of the cultural stewardship model acknowledge the important role that public domain building blocks play in the ongoing development of artistic culture. In this respect, they too recognize the mediating function of the public domain identified by Litman. They argue, however, that the idea-expression distinction adequately performs the function that Litman described, and will continue to

315-462 (2003); Samuelson, *supra* note 2; *see also* Lee, *supra*, note 6. I should note that my own previous work aligns me with this group. *See* J.E. Cohen, 'Lochner in Cyberspace: The New Economic Orthodoxy of 'Rights Management', 97 *Mich. L. Rev.* 462-562 (1998); J.E. Cohen, 'Copyright and the Jurisprudence of Self-Help', 13 *Berkeley Tech. L.J.* 1089-1143 (1998); J.E. Cohen, 'Copyright and the Perfect Curve', 53 *Vand. L. Rev.* 1799-1819 (2000).

44. W.M. Landes and R.A. Posner, *The Economic Structure of Intellectual Property Law*, Cambridge (Mass.), Harvard University Press, 2003; W.M. Landes and R.A. Posner, 'Indefinitely Renewable Copyright', 70 *U. Chi. L. Rev.* 471-518 (2003); *cf.* R. Polk Wagner, 'Information Wants to Be Free: Intellectual Property and the Mythologies of Control', 103 *Colum. L. Rev.* 995-1034 (2003) (arguing that enhanced control is likely to stimulate the growth of artistic and informational culture).

perform that function even if copyright is lengthened and expanded to cover new forms of creative expression.⁴⁵

The debate about which of the two models is more accurate is vigorous and often heated, and gives little sign of nearing resolution. The impasse results partly from widely divergent theoretical conceptions of the utility of proprietary rights in information and partly from a lack of good empirical evidence to bolster the theoretical claims. It also owes a great deal to the set of implicit conceptual markers originally laid down by the public lands model.

2.4. THE FOUR PUZZLES REVISITED

The foundational principles of the public lands model, described above, translate directly into a set of foundational assumptions that shape the debate about the public domain in contemporary copyright law. In particular, these assumptions create severe difficulties for the conservancy model, which does not endorse them but cannot seem to overcome them.

Recall, again, the four puzzles considered in Part 1. The puzzle of copyright duration turns on a gap between perceptions of both the value and the nature of the public domain. For pro-commodificationists/cultural stewardship theorists, the public domain is neither inherently productive nor inherently public. Anti-commodificationists/conservancy theorists have difficulty understanding this position, but in fact it maps rather well to the public lands model of the public domain, which is designed to facilitate the transfer of public lands to productive use by private parties. Individuals may not lay claim to these lands without the sovereign's consent, but the sovereign may elect to sell them – to the first taker, or the highest bidder, or in any other orderly fashion.

The Supreme Court's opinion in *Eldred v. Ashcroft* illustrates this conceptual mapping. The Court pointed to a regular, if intermittent, congressional practice of granting term extensions to subsisting patents and copyrights, both via generally applicable legislation and by specific grants of relief to particular right-holders.⁴⁶ This history, it reasoned, was persuasive evidence that copyright term extension did not violate the Constitution's 'limited times' requirement as long as Congress proffered a rational basis for privatization. In light of this tradition, the Court continued, the initial grant of rights could be said to include the expectation of receiving such extensions; therefore, extension of copyrights in subsisting works also did not violate the constitutional requirement that copyrights be granted only 'to promote [] Progress.'⁴⁷ If the public lands model is the touchstone for our conception of the intellectual public domain, these conclusions are both logical and sensible. Indeed,

45. See, e.g., Landes and Posner, *supra* note 44, at pp. 91-102; see also *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003).

46. *Eldred v. Ashcroft*, 537 U.S. 186, 200-204 (2003).

47. *Id.* at pp. 214-215.

any other result would prevent Congress from exercising a duty to privatize assets definitionally best suited for productive exploitation.

Consider next the puzzle of copyright's exemptions and limitations, which reveals that for pro-commodificationists, the public and the proprietary are geographically separate realms. Even pro-commodificationists who support fair use don't think successful invocation of the fair use doctrine renders the disputed work in any way 'public.' Just as the physical public domain lies elsewhere – on the Western frontier, or preserved behind the carefully delimited borders of national parks and preserves – so too with the intellectual public domain. Adherents of the conservancy model do not endorse this proposition but have difficulty countering it, because their own model of a productive or creative commons, and the associated trope of enclosure, lends itself to similar geographic conceptualization. This conceptualization, moreover, undermines arguments against commodification more generally; if the public domain in copyright is a discrete place, there are no significant barriers to commodification of everything else.⁴⁸

Next, recall the puzzle of copyrightable subject matter. For anti-commodificationists, many newly-developed informational goods are inherently noncopyrightable. Within the public lands model, newness itself is no bar to privatization; the government did not acquire the Louisiana Purchase or the Mexican Cession to hold them for the general public benefit. More fundamentally, for pro-commodificationists, the public domain is the province of the old and the archetypal. For anti-commodificationists, in contrast, the public domain is more fluid, and can encompass a wide variety of newly developed materials. But if the public domain is a separate, preexisting place, this argument becomes much harder to make.

Finally, consider the puzzle of the DMCA's anti-device provisions. For pro-commodificationists, it makes no sense to say that these provisions remove material from the public domain, because old material already in the public domain is there whether or not one can see it. The part of the public domain that contains the old and the archetypal is like a nature preserve, which one can visit to see rare creatures in their natural habitat. The fact that one cannot visit the nature preserve every day does not mean that it isn't there.

If adherents of the conservancy model have difficulty explaining why commodification threatens the public domain, it is the metaphor itself, and the accompanying legacy of the public lands model, that is partly to blame. But by embracing the term 'public domain' and the related geographically laden concept of the 'commons,' conservancy theorists have not made their task any easier.⁴⁹ And if adherents of the cultural stewardship model cannot see exactly how the public domain is relevant

48. It is precisely for this reason that the Nature Conservancy movement, on which aspects of the conservancy movement in copyright law are modeled, has enjoyed great success but ultimately lacks the power to combat environmental damage on a larger scale.

49. Notable variants with greater geographic promise are Pamela Samuelson's conception of the public domain as comprising a 'core' and a number of 'contiguous territories,' *see* Samuelson, *supra* note 2, and James Boyle's call for a legal realist disaggregation of the concept of publicness, *see* Boyle, *supra* note 17. I will return to these suggestions in Part 4.

to debates about commodification, it is because the definitional entailments of the public lands-based model foreclose some of the conservancy theorists' claims about the importance of public access to the constituent elements of artistic culture.

In short, the cultural stewardship model of the public domain maps well to the legal entailments of the public lands model, and this explains quite a bit about why contemporary debates about the public domain in copyright law turn out as they do. It does not follow, however, that the resulting conception of the public domain is the most appropriate one for copyright law. First, if historical antecedents are to be the test, which I do not argue, it must be acknowledged that the influence of the public lands model is something of a historical accident. If models of the cultural public domain are to be judged solely against standards of historical fidelity, the public lands model is not the only or even the leading candidate. There are the older models of 'public property,' 'common property,' and *publici juris* to consider, which situate the cultural public domain in more abstract, less geographically determined territory using the language of affirmative public right.⁵⁰

The ultimate test of any model of the public domain is not its historical fidelity, however, but whether it fits the phenomenon it is intended to represent. More specifically, because the public domain is a policy construct intended to foster the development of artistic culture, a theory of the public domain must make sense when measured against the ways that creative practice works.⁵¹ Judged against this criterion, the public lands-based understanding of the public domain fares poorly. Geography is not irrelevant to creative practice, nor to theorizing the public domain, but quite a different type of spatial metaphor is needed.

3. THE COMMON IN CULTURE: TOWARD A SOCIAL THEORY OF CREATIVE PRACTICE

One response to the debate about commodification and the public domain in copyright law has been an outpouring of scholarship directed at modeling the activities that the copyright system is intended to encourage. The mainstream of the scholarly literature has focused on economic modeling of markets for creative goods. Although such modeling is useful for a variety of purposes, it does not lead us any closer to understanding the phenomenon of creativity itself. Creativity is a social phenomenon that is both broader than and antecedent to the market exchange of goods and services. Studying it requires a correspondingly broader set of disciplinary resources. These alternative disciplinary approaches suggest an understanding of creative practice,

50. See Lee, *supra* note 6. As Part 4 explains, however, the notion of 'public property' does not adequately describe what I believe to be the optimal extent of the public's entitlement to make certain uses of common cultural resources regardless of who 'owns' those resources.

51. Cf. P. Bourdieu, *Outline of a Theory of Practice*, Cambridge, Cambridge University Press (R. Nice transl. 1977). For a similar approach to a closely related question of copyright policy, see M.J. Madison, 'A Pattern-Oriented Approach to Fair Use', 45 *Wm. & Mary L. Rev.* 1525-1690 (2004).

and of the development of artistic culture, that is quite different from that offered by the commodification/cultural stewardship model.

Specifically, here I mean to make three interrelated claims: First, artistic culture is an intrinsic good worth privileging, and saying so need not entail a commitment to privileging some forms of artistic culture over others. Second, artistic culture is most usefully understood not as a set of products (or, as economically-minded analysts might have it, cultural goods), but rather as a relational network of actors, resources, and creative practices. This network develops in ways that are path-dependent, cumulative, recursive, and collaborative. In particular, a critical ingredient in the development of artistic culture is the practical, uncontrolled accessibility of any element within the network to other elements. Third, propounding a theory of artistic culture grounded in creative practice as the predicate for a theory of copyright need not entail reliance on discredited fallacies about either the nature of rights or the nature of authorship.

3.1. CULTURAL MECHANICS

Within the scholarly literature on copyright, the commodificationist perspective is closely allied with the discipline of (law and) economics. The primary tool of this disciplinary approach is the model of market exchange. Because intellectual goods are not inherently excludable, markets for these goods are enabled by the legal, and more recently technical, construction of excludability. According to the basic economic model of copyright, excludability generates incentives to engage in creative activities and to maximize the value and productive life of the resulting outputs. Any resulting distributional inefficiencies can be addressed by narrow exceptions, but the model posits that such exceptions will be few. Instead, driven by the demands of a diverse public and by competition among copyright proprietors, the process of market exchange will produce a diverse and widely accessible variety of intellectual offerings.⁵²

Scholars seeking to challenge the commodificationist approach, and the related cultural stewardship model of the public domain have argued that this economic analysis of markets for intellectual goods is too simplistic. Noncommodified and incompletely commodified expression generate value differently than commodified expression, and in ways that are harder to measure. Much of this literature therefore has focused on generating a coherent account of the value that a regime of imperfect commodification produces.

Some theorists have attempted to build a case against commodification by offering competing economic accounts of the likely consequences of strengthening proprietary controls. This literature predicts shifts over time in the content of artistic culture resulting from two related trends. First, Yochai Benkler argues that commodi-

52. See, e.g., P. Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, revised ed., Stanford, Stanford Law School, 2003.

fied works containing a high proportion of recycled content will constitute an ever larger proportion of overall creative output because proprietors of large inventories of commodified content will be able to recycle that content at relatively low cost, while other creative actors will experience comparatively high input costs.⁵³ Second, a number of scholars have observed that increased commodification will affect the cost/benefit calculus for creators of many kinds of works that generate substantial positive externalities for society as a whole. Since these creators typically do not appropriate all or even most of the value of their works, they may be unable to justify the increased cost of inputs from preexisting works; if so, many socially beneficial works will be underproduced.⁵⁴

Other theorists have attempted to build a positive economic case for limits on the commodification of information by studying the productive role of common resources in the organization of economic activity generally. Carol Rose's work on ancient roads emphasizes the dynamic interdependence of private and public property.⁵⁵ Elinor Ostrom and Charlotte Hess have challenged the simple dichotomy between private and public goods by identifying several types of common resources and exploring the institutions that have evolved to manage them.⁵⁶ This work adds rich layers of complexity and texture to the basic public goods model that conventional law and economics has applied to the study of information markets. Lawrence Lessig expands on both of these themes, elaborating the centrality and institutional robustness of a variety of common creative resources.⁵⁷

A unifying theme of this work is an understanding of common resources not simply as the distant backdrop for productive activity that is largely private, but as the infrastructure that supports private productive activity and enables its success.⁵⁸ Another theme is the continual interplay between private and public resources. Connecting the two themes, one might analogize the public domain to a pervasive infrastructure for cultural interchange, a sort of cultural lingua franca without which

53. Y. Benkler, 'Intellectual Property and the Organization of Information Production', 22 *Int'l Rev. L. & Econ.* 81-99 (2002).

54. See Cohen, *supra* note 43, pp. 497-502; M.A. Lemley, 'The Economics of Improvement in Intellectual Property Law', 75 *Tex. L. Rev.* 989-1084 (1997), at pp. 1056-1058; L. Pallas Loren, 'Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems', 5 *J. Intell. Prop. L.* 1-58 (1997), at pp. 8-32. For a more comprehensive treatment of the topic of positive externalities and its significance for a regime of intellectual property protection, see M.A. Lemley, 'Property, Intellectual Property, and Free Riding', 83 *Tex. L. Rev.* 1031-1075 (2005).

55. C.M. Rose, 'The Comedy of the Commons: Custom, Commerce, and Inherently Public Property', 53 *U. Chi. L. Rev.* 711-781 (1986); C.M. Rose, 'Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age', 66 *L. & Contemp. Probs.* 89-110 (2003).

56. C. Hess and E. Ostrom, 'Artifacts, Facilities, and Content: Information as a Common-Pool Resource', 66 *L. & Contemp. Probs.* 111-145 (2003); E. Ostrom, *Governing the Commons*, New York, Cambridge University Press, 1990.

57. Lessig, *supra* note 43.

58. For a systematic treatment of the economic attributes of infrastructure resources, including information resources, see B.M. Frischmann, 'An Economic Theory of Infrastructure and Commons Management', 89 *Minn. L. Rev.* 917-1030 (2005).

proprietary forms of content could neither exist nor be received by their intended audiences.

A final strand of economically-oriented copyright scholarship explores the extent to which nonmarket production can stand on its own as a mechanism for the production of valuable intellectual resources. The initial catalyst for this effort was the open source software movement, which has enjoyed great technical and commercial success, but the scholarly frame of reference has expanded to encompass distributed 'peer production' of other cultural goods. Benkler in particular has championed nonmarket production as a viable and often superior method of producing goods that exhibit certain characteristics.⁵⁹

Even these more sophisticated economic efforts demonstrate, however, that economics is not a discipline well suited to the task of modeling creativity itself. The economic approach to modeling, and by hypothesis predicting, the growth of artistic culture is resolutely Newtonian: It seeks to derive precepts of copyright policy from the actions and reactions of interested parties with respect to existing creative goods or projects, and from the coefficients of friction introduced by different legal and market institutions. Even with more careful attention to the dynamic effects of proprietary rights, and to the interplay between the proprietary and the public, what remains most important is what the models leave out.

Economic models of creativity treat creative motivation as both exogenous and abstract. This limitation is inherent in the nature of economic reasoning generally. Economics infers motivation from conduct; it is not interested in, and lacks tools to explore, the problem of what creates motivation, and more precisely inspiration, in the first place. As a result, economic tools are good for explaining shifts in larger patterns of supply and demand, and for analyzing the institutional structures that evolve to enable exploitation of particular types of creative resources, but bad for identifying the conditions that will stimulate creative work in the first place. The problem is especially acute in cases of large creative leaps, which by their very nature cannot be predicted from existing patterns. Economics is fundamentally the study of production rather than creation. Admittedly the force of this distinction is blunted slightly in the age of mass-produced cultural works created for mass audiences.⁶⁰ Nonetheless it is still a difference that matters; the initial inspiration must come from somewhere. Economic models of markets for intellectual goods blithely consign inspiration to the category of 'fixed costs' (or, worse, assumed inputs); a categorization that seems to miss at least part of the point of a copyright system.

By the same token, economics lacks appropriate tools to study audience response to creative works. Economics can model demand, but demand is a poor metric for

59. See Y. Benkler, 'Coase's Penguin, or, Linux and The Nature of the Firm', 112 *Yale L.J.* 369-446 (2002); Y. Benkler, 'Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production', 114 *Yale L.J.* 273-358 (2004).

60. Cf. W. Benjamin, 'The Work of Art in the Age of Mechanical Reproduction', in W. Benjamin, *Illuminations*, Hannah Arendt, ed., New York, Harcourt, Brace and World, 1968 (arguing that mass production of cultural objects will fundamentally alter hierarchical conceptions of artistic value).

gauging the extent to which a work captures the public imagination. Two books may sell equally well, but one may shift public perceptions of the nature of art, or of life, while the other does not. Because it measures sales rather than the communication of ideas, economics lacks the tools to distinguish between the world-changing and the merely popular, on the one hand, and between the avant garde and the simply unappealing, on the other.

Although economic modeling can contribute to the understanding of markets for creative goods, and of the larger legal and social institutions that shape those markets, by itself it cannot provide adequate theoretical foundation for understanding the dynamics that drive the development of artistic culture, and therefore it cannot provide adequate theoretical foundation for copyright policy. Economic talk about creativity is trapped in Plato's cave; it purports to have divined creativity's ideal social form, but captures only its shadow. Creativity and creative practice are social phenomena that are both broader than and antecedent to the institutions with which both economics and more broadly political economy are concerned.

3.2. CULTURAL BIOLOGY

A second set of theories uses metaphors and models drawn from the life sciences to explain creative processes. A great strength of these models relative to the mainstream economic approach is their insistence on incorporating considerations of complexity and interdependence from the ground up. Their great weakness is their tendency to focus on information as the primary unit of analysis.

James Boyle offers a theory of information ecology modeled after both the theory and the politics of the environmental movement.⁶¹ Specialists in ecology seek to understand and celebrate complexity and interdependence in biological systems. They recognize that small changes may produce effects that reverberate through species, food chains, and habitats, ultimately disrupting larger patterns of sustainability. Similarly, Boyle posits that alterations in the legal rules governing information exchange may work large disruptions in the ecology of our creative culture.

In the realm of technical standards, Susan Crawford has outlined a theory of information development that is based on evolutionary theory.⁶² Here again, diversity and complexity are central themes. Crawford notes that a key measure of evolutionary fitness is the extent of intraspecies diversity. She posits that diversity is equally vital to ensuring the robustness and general adaptive fitness of technical standards. Using the copyright laws, or paracopyright regulation focused on technical

61. Boyle, *supra* note 17; J. Boyle, 'A Politics of Intellectual Property: Environmentalism for the Net?', 47 *Duke L.J.* 87-116 (1997); see also F.A. Pasquale, *The Market Effects of an Intellectual Commons: Lessons from Environmental Economics for the Law of Copyright*, SSRN #584682 (working paper 2004).

62. S.P. Crawford, 'The Biology of the Broadcast Flag', 25 *Hastings Comm./Ent. L.J.* 603-652 (2003).

protection measures, to pick winners in standards processes undermines diversity. Crawford therefore concludes that regulatory coordination of standards processes is ultimately unwise. One might draw similar conclusions about standardization in nontechnical realms of creative endeavor. If so, the greater cultural standardization likely to occur under conditions of pervasive commodification is cause for substantial concern.⁶³

Jack Balkin applies a different strand of evolutionary theory to the task of understanding patterns of nontechnical information flow in society. His theory of ‘cultural software’ borrows Richard Dawkins’ concept of ‘memes’ – subcellular units of genetic material that seek to maximize their own survival – to model social processes of information exchange.⁶⁴ Balkin argues that ideology similarly seeks its own propagation, and that those bits of ideology which prove both particularly compelling and particularly adaptable spread the most successfully. One might extend the same model to artistic styles and scholarly conventions. Like ideology, artistic expression depends for its continued vitality on both communication and change. Seen through the lens of Balkin’s theory, increased commodification in copyright law is bad policy not because it undermines diversity, but because it enables private control of creative content.⁶⁵

At the same time, however, models drawn from the life sciences betray a worrisome tendency toward animism. To the extent that these models purport to establish natural laws of information, we should be quite skeptical. Information is generated by human agency and through human perception; whatever properties it has are derivative of properties of human behavior and cognition. Life science-based models also metaphorically conflate creative diversity with literal, physical survival. That is good politics, but it is less satisfactory as theory. The human race may yet kill itself off, but copyright law is unlikely to be the cause.

Questions about the diversity of the information environment are political and philosophical in nature. That intellectual property scholars as a group are increasingly reluctant to discuss them as such reflects the relative disrepute into which humanistic inquiry has sunk in intellectual property scholarship.⁶⁶ The search for competing models of cultural development is in part a search for competing metaphors; in this regard, biological models that emphasize complexity, interdependence, and the functionality of communication are enormously valuable. Yet the evolution of creative subject matter cannot be understood separately from the behavior of creative people.

63. This conclusion aligns with the economic argument developed by Benkler, *supra* note 53.

64. J.M. Balkin, *Cultural Software: A Theory of Ideology*, New Haven, Yale University Press, 1998; see also T.F. Cotter, ‘Prolegomenon to a Memetic Theory of Copyright’, 55 *Fla. L. Rev.* 779-793 (2003); see generally R. Dawkins, *The Selfish Gene*, Oxford, Oxford University Press, 1999.

65. J. Balkin, ‘Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society’, 79 *N.Y.U. L. Rev.* 1-58 (2004).

66. I should make clear that I do not count either Balkin or Boyle personally as reluctant humanists. Boyle in particular is quite clear that the environmental metaphor is a metaphor, selected in part for its rhetorical and political value. I mean only to suggest that the metaphor frames the discussion in other ways as well.

3.3. CULTURAL ANTHROPOLOGY

A third strand of the emerging literature focuses on historical and anthropological investigations of artistic communities and practices. These investigations reveal that copying, reworking, and derivation are not peripheral or inauthentic activities, but lie at the core of creative practice however it is defined.

Because popular music has become a primary battleground of the copyright wars, it is instructive to start there. Two persistent themes in the study of music force an appreciation of the centrality of derivative uses. First, forms of music long understood as created 'from the ground up' by a ceaseless process of innovative borrowing – blues, jazz, folk, and so on – increasingly are also acknowledged as important and 'serious' cultural forms. Second, musicologists who study the 'classical' form now enshrined as elite culture have painstakingly documented the fact that classical composers have been no less dependent on borrowings and reworkings than their down-market counterparts.⁶⁷ The great composers of the Western canon borrowed from each other and also from a range of less elevated source materials. Although we think of 'sampling' as an essentially modern practice, they filled their symphonies and overtures with sound samples ranging from hunt horns to carnival music, all sound heard in the background of their own lives. Sometimes, the borrowing and reworking were far more central. The third movement of Mahler's powerful first symphony is based on the French children's song 'Frere Jacques'; there are countless other examples.

Copying and reworking have been equally central to the evolution of the visual arts. At least since the Renaissance, copying has been considered an essential part of artistic development for both novices and mature artists.⁶⁸ For mature artists, reworking others' material is part of an ongoing artistic dialogue, and also furnishes material for a broader conversation among fellow artists, critics, and members of the public. Thus, for example, the 2003 'Manet/Velasquez' exhibit at New York's Museum of Modern Art celebrated Velasquez as a source of artistic inspiration for the impressionist movement, and featured several Velasquez works side-by-side with Manet's reinterpretations of those works. The 2004 'Calder Miro' exhibit at the Phillips Collection in Washington, DC, traced the parallel evolution of various compositional elements in the work of the two artists, who were also close friends. Contemporary sculptor J. Seward Johnson, Jr., has continued this tradition of creative reinterpretation by building three-dimensional reproductions of paintings by impressionist masters. When this work was exhibited at the Corcoran Gallery of

67. See O.B. Arewa, 'From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context', 84 *N.C.L. Rev.* 547-645 (2006); J.P. Burkholder, A. Giger and D.C. Birchler, eds., *Musical Borrowing: An Annotated Bibliography*, <www.music.indiana.edu/borrowing/>; Negativland, 'Two Relations to a Cultural Public Domain', 66 *L. & Contemp. Probs.* 239-262 (2003).

68. See C.J. Homburg, *The Copy Turns Original*, Amsterdam, Benjamins, 1996. As Homburg explains, understandings of the purpose of copying and the degree of fidelity required changed over time as a result of both changing views of the nature of art and political struggles for control of validating institutions, but the copy remained constant.

Art in Washington, DC, press materials prepared by the curators noted its uncanny ability to take viewers inside the works, thereby changing the relationship between observer and observed.

Audio-visual works of mass culture similarly generate both box office momentum and critical acclaim by reworking existing materials. Some films are obvious products of creative pastiche; films in this tradition range from *Shrek* to *Scary Movie* to the *Austin Powers*, *Airplane*, and *Naked Gun* series. A focus on parody and pastiche, though, would greatly understate the extent to which film relies on a more diverse repertoire of creative borrowings. The extra features included on commercially available DVDs often draw attention to and celebrate these borrowings. To take one recent example, the DVD of *Kill Bill* (volume 1) includes a short documentary in which director Quentin Tarantino explains the film's debt to a range of preexisting works ranging from modern Japanese anime to old Japanese spaghetti Westerns.

One could argue that, in light of the enormous investment poured into mass commercial culture, reworkings of these cultural products nonetheless should be subject to slightly different rules. But it is the essence of reworking to cross lines and blur boundaries. One can think of no more omnipresent visual icons of the Pop art movement than Andy Warhol's monumental Campbell's soup cans or his silkscreened portraits of celebrities such as Jacqueline Kennedy Onassis and Marilyn Monroe. Among the works of twentieth century painter Larry Rivers are a series of portraits of great artists and performers in the settings that inspired them. In one, impressionist painter Henri Matisse stares out from within a papier maché reproduction of his celebrated 'Red Room'; in another, Charlie Chaplin climbs the assembly line in the film *Modern Times*. It is hard to see why different conventions should govern the two works, which equally portray icons of cultural modernism. And as films from *Amadeus* to *Pollock* to *Basquiat* to *Shine* to *Shakespeare in Love* demonstrate, Hollywood in its turn has found endless creative fodder in the lives of artists great and small.

Works of literature and drama are often viewed as the most individualistic and least derivative, but here too borrowing and reworking are both conventional and critically prized. Here are some examples drawn from a wave of prominent and critically acclaimed literary and dramatic retellings that spans the twentieth century: George Bernard Shaw's *Pygmalion* (followed by Lerner and Loewe's *My Fair Lady*); James Joyce's *Ulysses*; John Barth's *Grendel*; Thornton Wilder's *The Skin of Our Teeth*; Tom Stoppard's *Rosencrantz & Guildenstern Are Dead*; David Henry Hwang's *M. Butterfly*; Pia Pera and Ann Goldstein's *Lo's Diary*; Sena Jeter Naslund's *Ahab's Wife*; Gregory Maguire's *Wicked*. Reworking is common practice in the realm of performance as well; within the 2003/04 season alone, Washington's critically acclaimed Shakespeare Theatre restaged Sophocles' Oedipus cycle in Africa, Shakespeare's *Richard III* in a mental hospital, and recast the tragically doomed son in Ibsen's *Ghosts* as a victim of AIDS rather than tuberculosis.

Once again, though, a narrow focus on the twentieth century and the literary products of cultural modernism obscures the extent to which reworking has been a common literary device throughout the history of the written word. A leading practitioner of this method was Shakespeare, who borrowed plot materials from

numerous preexisting (and often copyrighted) works.⁶⁹ In addition, Shakespeare often used the device of a play-within-a-play to introduce the stories of classical mythology, as when the hapless tradesmen of *A Midsummer Night's Dream* perform the tragedy of Pyramus and Thisbe for the royal court. This performance, and others like it, are the original fan fiction, a practice of participatory and critical engagement with cultural works that stretches back hundreds of years.

The forms of creative borrowing have changed in some respects. First, because creative expression draws upon raw materials from everyday life, the subject matter of creative works has changed as well. Yet some of what looks like change is instead continuity. Then, as now, artists drew inspiration from myth, legend, and celebrity. Today, pop culture rather than Greek mythology or Catholic hagiography provides a primary source of new material. The substitution of earthly deities for heavenly ones does not render creative borrowing fundamentally different.

Second, as the historical record has expanded to encompass photographic documentation, the scope of historically inspired borrowings expands correspondingly. The most-cited example of this point is probably the big-budget film *Forrest Gump*, which applied the techniques of collage to 'document' its eponymous hero's involvement in various important twentieth-century events. Yet once again the point goes far beyond Hollywood and far beyond collage. I have a friend who paints stunning, fauvist portraits of great jazz musicians, most of whom are no longer living. Because she can no longer see her subjects in person, she works from old photographs. To call this infringement, or derivative in the pejorative sense, would be to misconstrue completely the deeply creative nature of her enterprise. Like the written and spoken word, the visual gives us access to our past, and so to ourselves.

One might argue that the contemporary artistic ethos recognizes fewer limits on freedom to tamper with story line or imagery than in previous eras, and that copyright is necessary to keep experimentation within bounds. Yet that explanation rings false for reasons both old and new. The history of art is one of challenges to cultural orthodoxy; many claimants to canon status today were seen as rebels or outsiders first. Art, and creative practice more broadly, are transgressive, mongrelizing, and frequently democratizing forces. Phenomena as diverse as high-concept appropriation art and fan fiction are simply the logical outgrowth of these tendencies in an era of networked communication. And the mass culture industries are equally eager to dissolve the boundaries of their own creative works. Movies on DVD offer deleted scenes, alternate endings, 'director's cut' versions, and behind-the-scenes commentary on the production process, and 'unplugged' recordings of popular music give familiar compositions and performing styles an entirely new feel. These offerings acknowledge that reworking of sounds, images and texts lies at the heart of the creative process as it is understood by practitioners ranging from the iconoclastic to the mainstream.

All of this would be beside the point if there were any plausible basis for thinking that, when we as a society make claims about the intrinsic worth of art, these examples

69. See <www.shakespeare-online.com/sources/>.

are not the sort of thing that we mean. But of course we do mean these examples, and thousands of others. And we routinely invoke them as justification both for having copyright laws and for deciding particular cases in particular ways.

3.4. NOTES TOWARD A SOCIOLOGY OF CREATIVE PRACTICE

So far, these rich descriptive accounts of creative practice lack a correspondingly rich theoretical component. Furnishing one requires not an economics or a biology or a politics of creativity, but more broadly a sociology. As the biologically-derived theories of creativity suggest, principles important to modeling creativity in a more rigorous way will include the interdependence of information, the robustness of complexity, and the centrality of both communication and change. But a theory of creativity must be rooted, as well, in disciplinary approaches that concern themselves primarily with human agency and social structures. At the same time, such a theory must remain rooted in the day-to-day realities of creative practice – in what people actually do in the spaces where they live.

In recent debates about commodification and the public domain, the account of artistic borrowings as widespread and inevitable has become associated on a theoretical level with the work of Rosemary Coombe,⁷⁰ and on an applied or practical level with the work of appropriation artists such as Negativland and Sherrie Levine. Yet a general theory of artistic creativity will not privilege only acts of distancing or cultural opposition, for the simple reason that the history of creative practice is far more complex, and encompasses a much wider range of borrowings. Although one can cite examples of self-described appropriation art to illustrate the principles of complexity, interdependence, and communication, there is no need to do so. A theory of artistic creativity must describe a more general relationship between individuals and their cultural surroundings. Postmodernist theory, in turn, describes a special case of this relationship under certain legal and political conditions, namely those in which audience members are forced into a duality of consumer/opposer with respect to cultural products. Postmodernist theory is not the alternative to commodification, but its complement; it supplies a comprehensive theory of the way that people will interact with their cultural environment under conditions of commodification.⁷¹ A general theory of creativity must do more.

One might argue that the list in Section III.C seems to privilege a particular, overnarrow and determinedly Western conception of ‘art,’ and to hint at an equally suspect conception of artistic merit. This objection is enormously important but not, I think, fatal. The list in Section III.C reflects the Western canon, both classical and contemporary, because that is what I know, but it is intended to illustrate a point

70. R.J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and Law*, Durham (N.C.), Duke University Press, 1998.

71. Cf. F. Jameson, *Post-Modernism and the Cultural Logic of Late Capitalism*, Durham (N.C.), Duke University Press, 1991; Frank Webster, *Theories of the Information Society*, London, New York, Routledge, 1995.

about practice, not a point about taxonomy. The available evidence suggests that a more inclusive taxonomy would only underscore the centrality of borrowing, collaboration, and environment to creative practice of all sorts.⁷² As to merit, I plead guilty of believing that in hindsight, it is possible to say that some art is better and that a small fraction of that art is superlative, but it seems to me that that is not saying much. Debates about what is art, and what is good art, are integrally bound up with the generation of particular cultural narratives. At the same time, universally across human cultures, artistic culture (however defined) preserves space and time for reflection and conscious (re)definition of identity, both individual and collective. Such efforts will be filtered through the prism of preexisting identity, but that is better than the alternative.

Another way of putting the point, perhaps, is that in contemporary (Western) copyright theory, the distinctive modes of navel-gazing practiced by anthropologists, sociologists, and critical theorists can combine to produce a perfect storm of self-doubt. It is both possible and essential to make and defend explicit normative claims about the importance of artistic culture – while at the same time acknowledging and bracketing very valid questions about the meaning of ‘culture,’ the culturally-contingent nature of art and creative practice, and the political valence of judgments about artistic merit. Those are matters to be visited and revisited during the ongoing process of framing and applying rules about the nature and scope of proprietary rights in artistic culture; they are not reasons to abandon the field entirely.

I do not pretend to have synthesized a general theory of artistic creativity. Instead, I offer a series of propositions that I believe any such general theory must include.

1. Creative practice is both determined and underdetermined by cultural environment. People create culture, but are also created by it. For practitioners of the disciplines that study human social institutions, this preliminary point is so true as to be trite. Although they do very different things with it, the constitutive aspect of culture is a starting point for sociologists, anthropologists, communication theorists, and many others.⁷³ The point is nonetheless an appropriate place to begin, simply because

72. See, e.g., Arewa, *supra* note 67 (discussing hip hop culture and its origins); O.B. Arewa, *Cultural Autonomy and Cultural Hierarchies: Sacred Spaces, Intellectual Property and Local Knowledge* (working paper 2004, SSRN #596921) (describing process of cultural ‘creolization’); W.P. Alford, *To Steal a Book Is an Elegant Offense*, Stanford, Stanford University Press, 1995 (discussing attitudes toward copying in traditional Chinese culture); M. Randall, *Pragmatic Plagiarism: Authorship, Profit, and Power*, Toronto, University of Toronto Press, 2001 (exploring the evolving social construction of the boundary between ‘plagiarism’ and ‘authorship’).

73. See, e.g., P. Bourdieu, *The Field of Cultural Production*, Columbia University Press/Cambridge, Polity Press, 1993; M. Foucault, *The Order of Things: An Archaeology of the Human Sciences*, New York, Pantheon Books, 1970; G. Bowker and S. Leigh Star, *Sorting Things Out: Classification and Its Consequences*, New York, MIT Press, 1999; F. Webster, *Theories of the Information Society*, London, Routledge, 1995. Regarding the content of the term ‘culture,’ I refer the reader to note 4 above. In this section, I use ‘culture’ both in the narrow sense described there and more broadly to include the full gamut of symbols and practices within a society. On the mutually

copyright jurisprudence and mainstream economic copyright scholarship have yet to recognize it.

Copyright's implicit model of creativity, and more broadly of artistic culture, remains firmly ensconced in the nineteenth century. This model assumes human dominion over artistic culture, which is to say that it does not perceive a constitutive role for artistic culture at all.⁷⁴ To the contrary, it is the presumptive passivity and nonfunctionality of artistic culture that undergird the traditional separation between the copyright and patent systems. The technological processes with which the patent system is concerned are chains of physical, chemical, or electrical cause and effect that produce largely predictable results. Artistic culture, in contrast, is not perceived to work this way. That is, we generally do not observe similar chains of causes and effects within ourselves as a result of exposure to artistic or informational works.

The experiential model of culture production as divorced from functionality suffers from what a contemporary social scientist might describe as a self-study bias. We experience individuality as the possession of an autonomous, exogenous self, and therefore infer that although we consume cultural goods, we shape them and not the reverse. Yet it is difficult to define an individual self that exists wholly apart from and exogenous to the cultural environment. A child born in a mountain village in Western Pakistan will probably come to believe very different things than a child born on the same day in Los Angeles or Tokyo. The predominant forms of artistic culture within different societies will vary accordingly, and will evolve differently, even when they appear to exhibit cross-cultural similarities or when cross-pollination produces areas of seeming convergence.⁷⁵ Culture is a matrix for structuring both the forms of human entertainment and the weightier matters of what we know and how we claim to know it. Creative practice is determined in large part by the content of the immediate artistic environment, and more generally by the entirety of an individual's cultural conditioning.

At the same time, the results of creative practice are not predetermined. Culture does not function in the same way that chemistry or physics or electricity functions. If you mix gaseous hydrogen with gaseous oxygen, you will get an explosion and a few drops of water, in exactly predictable amounts, every time. If you mix Homeric epics with the history and folk traditions of the American South, you may get *Oh Brother, Where Art Thou?*, or *Cold Mountain*, or any number of other possibilities.

The determinism that characterizes creative practice, and cultural processes more broadly, is not a matter of rigid cause and effect, but more loosely of path

constitutive relationship between the two, see A. Bowler, 'Methodological Dilemmas in the Sociology of Art', in D. Crane (ed.), *The Sociology of Culture: Emerging Theoretical Perspectives*, Oxford, Blackwell, 1995, p. 247; Richard A. Peterson, *Culture Studies Through the Production Perspective: Progress and Prospects*, in Crane, *supra*, at p. 163.

74. As discussed in Part 4.2 below, this perception appears most clearly in judicially-developed rules that increasingly restrict invocation of both the idea-expression distinction and the fair use doctrine to cases of proved need to use another's expression.

75. For an example of cross-cultural similarities and differences, see <en.wikipedia.org/wiki/Cinderella> (describing variants of the Cinderella story that appear in different cultures) and <edsitement.neh.gov/view_lesson_plan.asp?id=419> (same).

dependence. Cultural processes are positive feedback loops. Cultural conditioning influences the ways that people respond to their cultural environment, and to the artifacts and experiences available in culture markets, and these responses influence the further development of cultural goods and experiences, including works of creative expression. For all that, culture changes, and often in ways that could not be predicted, however clear the lines of causality may seem in hindsight. It over-generalizes only slightly to say that economic models of information interdependence overstate the extent of individual agency in this process, while biological models understate it. The truth is more nearly somewhere in between, and we need a different way of getting at it.

From all of this it follows that creative practice can be predicted, but only in the most general terms; it is what humans do. The specific outlets that creative practice takes and the results it yields cannot be predicted. Even within the natural sciences, understanding of complex systems is still in its infancy. The problems that must be solved to understand complex social systems are more difficult by many orders of magnitude. Creative practice can be studied, with an aim of generating descriptive models and understanding the variables that seem to matter, but that is all. Economic models that focus on licensing as the engine of creative development mistake the clarity of hindsight for perfect predictability. Rather than attempting to predict specific creative outputs, or shackling creative practice to economic models that impose unattainable standards of prescience on 'owners' of creative content, copyright policy should focus on creating the conditions likely to prove most fertile for creative practice generally.

2. Artistic culture develops by a process of iteration within established conventions, punctuated by larger 'representational shifts.' The unpredictability of specific creative outputs does not preclude a more general understanding of the processes by which artistic culture develops. Work within sociology proper historically shied away from exploring the content of artistic culture and focused instead on the social structures that surround and facilitate culture production, while work within art history and criticism pursued the opposite strategy.⁷⁶ Scholars working in the emerging interdisciplinary area of cultural studies have recognized that to shed light on the production of culture, including artistic culture, it is necessary to engage content and social structure together.⁷⁷ My aim in the next two sections is a (relatively) modest one: I suggest that the study of creative practice can draw valuable lessons from the relatively more developed literature on the sociology of science and technology, which seeks to do exactly that.

The 'Art History 101' view of cultural development as a series of great leaps forward obscures the fact that the vast majority of artistic endeavors do not consist of such leaps. Niva Elkin-Koren and Eli Salzberger remind us that what is true

76. See: Bowler, *supra* note 73; see also D. Crane, *The Production of Culture: Media and the Urban Arts*, Newbury Park, Sage, 1992, pp. 77-106.

77. See: Bowler, *supra* note 73; Crane, *supra* note 76; H.S. Becker, *Art Worlds*, Berkeley, University of California Press, 1982; Peterson, *supra* note 73.

for science is true for other manifestations of human creative energy. Most artists practice ‘normal science’ in the Kuhnian sense.⁷⁸ They work with established methods and techniques and within established conventions, and produce works of creative expression for themselves, their families, and their communities. Reworking, borrowing, and imitation are essential to this process.

Like science, creative practice also experiences larger shifts. Whether these shifts are properly considered ‘paradigm shifts’ in the Kuhnian sense is less clear. As defined by Kuhn, a ‘paradigm’ refers to a theoretical framework for understanding a field of inquiry; a paradigm shift occurs when one framework completely supplants the framework that preceded it.⁷⁹ In this respect, creative practice and scientific practice exhibit some similarities, but also some important differences. First, scientific practice is constrained by pragmatic considerations such as the reproducibility of laboratory results. This is true even for paradigm-shifting science; new theories still must fit the facts. Creative practice is constrained by both technical limits and past practice to a much lesser degree; creative experiments don’t need to ‘work’ in any generally accepted sense (although they must appeal to someone’s aesthetic sensibility in order to survive). Second and relatedly, creative practice in any given field simultaneously can encompass multiple and contradictory frameworks.

It probably is more accurate, then, to say that creative practice does not experience paradigm shifts per se, but rather experiences what we might call representational shifts – large shifts in ways of representing images, sounds, and ideas that alter the way the creative enterprise in a given field is understood even by those who do not adopt the new framework in their own creative practice. Thus, for example, the development of the twelve-tone approach to musical composition in twentieth-century Western symphonic music and the development of cubism in twentieth-century Western painting count as representational shifts, in that each dramatically affected perceptions of the compositional possibilities in their respective fields even though they were always minority practices.⁸⁰

3. Within both modes of artistic development, creative practice is relational and network-driven. Copyright jurisprudence is centrally concerned with resolving disputes over the end products of creative practice. As a framework for setting policy, however, exclusive focus on outputs is a mistake. Artistic culture is most usefully understood as a relational network of actors, resources, and practices.⁸¹

78. N. Elkin-Koren and E.M. Salzberger, *Law, Economics and Cyberspace: The Effects of Cyberspace on the Economic Analysis of Law*, Cheltenham, Edward Elgar, 2004, §1.4; see T.S. Kuhn, *The Structure of Scientific Revolutions*, 1st ed., Chicago, Chicago University Press, 1962.

79. See Kuhn, *supra* note 78.

80. For discussion of the ways in which representational shifts reverberate within ‘art worlds’ in music, see Becker, *supra* note 77, at 301-310.

81. Thanks to Brett Frischmann for drawing my attention to the distinction between outputs and processes. The analysis in this section also owes a debt to Michael Madison’s discussion of ‘emergentist’ approaches to creativity. See M.J. Madison, ‘A Pattern-Oriented Approach to Fair Use’, 45 *Wm. & Mary L. Rev.* 1525-1690 (2004), pp. 1682-1686.

Research in the psychology of creativity has focused primarily on identifying attributes of creativity in individuals, and has identified a complex of cognitive and personality factors that predispose certain individuals to creative work.⁸² This research also has revealed, however, that individual creativity is socially structured to a significant degree. Creative practice thrives in an environment that facilitates open exchange and experimentation; it fails to thrive or does not thrive as hardily in an environment that does not do these things.⁸³ Although there is much that is individual about creativity, creativity therefore cannot be understood simply as an individual phenomenon.

Whether there is a distinct subcategory of creativity properly labeled genius, and whether it is continuous or discontinuous with ordinary creativity, are hotly debated questions, but they appear to be irrelevant to the question whether environment is an important determinant of creativity. Both Howard Gardner's work on the characteristics of highly creative individuals and Dean Simonton's attempt to develop a more general theory of genius-level creativity emphasize the important roles of environment at various stages of the creative process.⁸⁴

A corollary to these points, which returns us again to the sociology of science, is that the Mertonian model of open exchange within scientific communities translates surprisingly well to creative communities.⁸⁵ Creative practitioners of all types continually share and discuss their work with one another, and regard the norm of sharing as integral to the creative process. Periods of great artistic ferment may be characterized by especially intense collaboration and exchange among members of relatively close-knit communities.⁸⁶

Communities and organizations within 'art worlds' also police innovation in different ways. Socially, the production of culture is mediated by a variety of organizations ranging from managers to galleries, concert halls and publishers to official and alternative tastemakers to public funders. To succeed, both paradigm shifts in science and representational shifts in art must secure access to existing formal and informal structures of validation within the field, or must generate

82. See T.M. Amabile, *Creativity in Context*, Boulder, Westview Press, 1996; M. Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery and Invention*, New York, Harper Collins, 1996; H. Gardner, *Creating Minds: An Anatomy of Creativity Seen Through the Lives of Freud, Einstein, Picasso, Stravinsky, Eliot, Graham, and Gandhi*, New York, Basic Books, 1993; D.K. Simonton, *Origins of Genius*, New York, Oxford University Press, 1999.

83. See Amabile, *supra* note 82, at pp. 115-120, 124-127, 231-232; Csikszentmihalyi, *supra* note 82.

84. See Gardner, *supra* note 82; Simonton, *supra* note 82, at pp. 206-215.

85. See R.K. Merton, *On Social Structure and Science*, Chicago, University of Chicago Press, 1996, pp. 269-276.

86. The importance of community to the creative process is clear even from historical narratives that focus primarily on individuals, such as Daniel Boorstin's account of great Western artists and intellectuals. D.J. Boorstin, *The Creators: A History of Heroes of the Imagination*, New York, Vintage Books, 1993; see, e.g., id. at pp. 384-394 (discussing Brunelleschi's position in Florentine society and his connections to some other contemporary artists), 515-521 (describing relationships between Monet and other leading impressionist painters).

enough momentum to establish new structures.⁸⁷ Gardner concludes that the ability to negotiate these processes is a defining characteristic of those who we come to regard as exhibiting genius.⁸⁸ This finding aligns with sociologist Howard Becker's conclusion that most artistic mavericks become obscure historical footnotes, if indeed they are noticed at all.⁸⁹

Finally, a relational account of creative practice must acknowledge the role of preexisting cultural artifacts as constituent elements of the network. This point is related to and builds from the path-dependency point made above. Preexisting artifacts don't simply channel current activity passively in one direction or another. The creative process is one of active engagement with and reinterpretation of those artifacts. Within both the study of art and the study of science and technology, there is considerable agreement on this point but much disagreement about exactly how to frame it. Postmodernist literary theory and the strict constructivist theory of technology alike hold that texts/technologies have no fixed meanings, but rather take on meanings ascribed by their readers. Both theories have been criticized for ascribing autonomy to human-generated artifacts. To conceive of artifacts as coequal, autonomous actors, however, is to miss the point; indeed, a central tenet of the sociology of science and technology is that technologies are not autonomous.⁹⁰ My point is a narrower one: To the extent that a cultural artifact, be it text or technology, permits a variety of uses and interpretations, both on its own terms and as juxtaposed with other artifacts, its developmental path is never wholly within anyone's control. Both its origins and its continuing relevance are determined by negotiation and renegotiation among the elements of the network.⁹¹

In particular, it is worth emphasizing that, like paradigm shifts in science, representational shifts in art rely heavily on both preexisting artifacts within the network and cross-fertilization between different 'fields' and 'domains.'⁹² A paradigm-shifting scientific theory is not a departure from the old, but a reconceptualization of it to encompass anomalous observations that normal science within the preexisting paradigm could not explain. Some such theories are stimulated by fortuitous encounters

87. See: Crane, *supra* note 76; Becker, *supra* note 77.

88. See: Gardner, *supra* note 82.

89. See: Becker, *supra* note 77, at pp. 244-246.

90. See, e.g., L. Winner, *Autonomous Technology: Technics-out-of-Control as a Theme in Political Thought*, Cambridge, MIT Press, 1977.

91. Cf. B. Latour, 'Technology is Society Made Durable', in J. Law (ed.), *A Sociology of Monsters*, London, Routledge, 1991, p. 103; M. Callon, 'Techno-Economic Networks and Irreversibility', in Law, *supra*, at 132. The 'actor network' theory developed by Bruno Latour and Michel Callon as a framework for understanding technological change is by no means a model of clarity. In particular, the theory's claims about the role of non-human 'actants' within the network are subject to considerable debate. I understand Latour and Callon to argue that artifacts are actors in the sense that they crystallize, more or less durably, symbolic and structural relationships.

92. This terminology follows Csikszentmihalyi and Gardner, who distinguish between sets of technical and conceptual tools ('domain') and external social structures ('field'). See Csikszentmihalyi, *supra* note 82, at pp. 36-45; Gardner, *supra* note 82, at pp. 34-40; cf. Bourdieu, *supra* note 73.

with concrete, practical problems that previous theoreticians had not considered.⁹³ Historians of science also have observed that many paradigm-shifting theories are generated by scientists who migrate to one field after being trained in another.⁹⁴

Similarly, representational shifts in art often rework and assimilate a broad and boundary-crossing array of inputs from the surrounding culture. Thus, for example, it is well known that around the turn of the twentieth century, many painters derived inspiration from traditional Japanese prints which were then in vogue in Paris.⁹⁵ The person credited with development of the technique of linear perspective that came to dominate Renaissance painting, Florentine architect Filippo Brunelleschi, was trained in the architect's techniques of measuring and surveying and had made an in-depth study of Roman architectural ruins; the famous experiment that he used to demonstrate the power of the technique appears to have relied heavily on his architectural training.⁹⁶ Twentieth-century American composer John Cage drew upon Chinese philosophy, as embodied in the *I Ching*, to introduce elements of randomness into his compositions. The 'African novel' is a hybrid cultural form that adopts the literary conventions of the colonial West.⁹⁷ Creative practice at its most creative is messy, free-wheeling, and opportunistic; people seize inspiration where they find it and pursue it wherever it leads.

For all of these reasons, it should be abundantly clear that talking about creativity and inspiration need not entail philosophical commitment to discredited romantic ideals of individual authorship and related notions of the natural rights of authors.⁹⁸ At the same time, we would do well to recognize that flight from romanticism in copyright scholarship has produced its own set of pernicious effects. It has become fashionable to regard authorship as an eighteenth-century invention. But matters are not so simple. Both the idea of authorship and the related idea of plagiarism (which necessarily presumes authorship) are far older than the idea of copyright.⁹⁹ Artistic creativity is contextual, collaborative, and mediated by artifacts and networks of artifacts, but it does not for all that cease to exist. To conclude that one cannot speak of creativity and inspiration to describe the spectrum of phenomena that characterize creative practice would validate the pure ideal of romantic authorship that the critique of authorship purports to discredit.

93. See, e.g., P. Galison, *Einstein's Clocks, Poincare's Maps: Empires of Time*, New York, Norton, 2003.

94. See Simonton, *supra* note 82, at pp. 123-124.

95. For an illuminating discussion of this history and its implications for copyright doctrine, see P.E. Geller, 'Hiroshige Vs. Van Gogh: Resolving the Dilemma of Copyright Scope in Remediating Infringement', 46 *J. Copyright Soc'y U.S.A.* 39-70 (1998).

96. See Boorstin, *supra* note 86, at pp. 384-94; Csikszentmihalyi, *supra* note 82, at pp. 32-34. As Boorstin notes, Brunelleschi may even have rediscovered perspective, which had been employed in a more free-form fashion by some ancient Greek and Roman craftsmen.

97. For a penetrating commentary on the early social construction of the African novel by the French literary establishment, see Randall, *supra* note 72, at pp. 238-240.

98. Nor to equally discredited ideals of natural law. My focus here is on understanding creative behavior, not on divining the platonic form of authors' rights.

99. See Randall, *supra* note 72, at pp. 32-59.

4. *The common in artistic culture is not a separate place, but the common cannot be separated from considerations of space.* Terms like ‘path dependence’ and ‘cross-fertilization’ are abstractions, and cannot by themselves constitute a functioning model of artistic culture and creative practice. The uncritical assumption that information is available because it is ‘out there’ is one of the central failings of the mainstream economic model and the associated public lands/cultural stewardship model of the public domain. If creative practice entails the opportunistic exploitation of a set of environmental resources, copyright policy must pay close attention to the structure of that environment.

Attempts to characterize the common in culture evoke spatial metaphors for good reason. Human societies exist in space as well as time, which means that artistic culture both produces and is produced by particular configurations of space that characterize social practice more generally.¹⁰⁰ Articulating a theory of the common in artistic culture in spatial terms therefore makes good sense, and may be inevitable. Edward Lee’s formulation, the public’s domain, has considerable promise to the extent that it characterizes access to the common in culture as a matter of right.¹⁰¹ Yet to the extent that the word ‘domain’ connotes a space with defined boundaries and ownership, it does not fit the phenomenon it is used to describe.

It is not the language of bounded space but rather the language of distributed spatiality – environment, landscape, network, milieu – that is more appropriate to convey the lived experience of the common in artistic culture. Experientially, the common in culture is the network of artifacts, communities, organizations and practices within which each person is situated. Although many predictors of creativity are internal, the network mediates the process by which creative disposition and motivation are translated into creative practice.

5. *Creative practice will thrive most fully in an environment that is both information-rich and (relatively) uncontrolled.* A legal regime intended to stimulate a rich outpouring of creative expression must ask what conditions are most likely both to foster the ‘normal science’ of everyday creative practice and to stimulate larger creative leaps, and to produce these effects in the spaces where people actually live. The centrality of borrowing, reworking, and cross-fertilization to creative practice suggests that creative practice will thrive under conditions that allow a substantial degree of unplanned, fortuitous access to and use of a variety of cultural goods.

Research in the social psychology of creativity confirms that access to resources within one’s chosen field and domain(s), and within one’s society generally, is of paramount importance. Creative practitioners need to know what their predecessors have done and what their peers are doing, not only to learn skills and gain entree to relevant social networks, but also so that the work itself will stimulate new associa-

100. On the social production of space, see D. Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change*, Oxford, Blackwell, 1990; H. Lefebvre, *The Production of Space* (Donald Nicholson transl. 1971), Oxford, Blackwell; E.W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory*, London, Verso, 1989.

101. Lee, *supra* note 6.

tions and experiments.¹⁰² The prevailing economic model of creativity acknowledges the desirability of access to preexisting creative works, but treats gradations in the quality of access as price points. Supporters of increased commodification, in particular, envision that creative individuals who desire unrestricted access will purchase it. Attention to the centrality of unmediated cross-fertilization and opportunistic borrowing in creative practice suggests that this approach is perverse, for it introduces the friction of transaction costs precisely where such costs will likely do the most harm.¹⁰³ It seems far more reasonable to predict that creative expression will flourish most abundantly when there is a substantial degree of freedom to determine the duration and nature of engagement with the resources found in one's cultural environment.¹⁰⁴ And if so, we might reasonably conclude that at least some of the time, copyright law should adjust to accommodate the constraints imposed by creative practice, rather than the other way around.

One might object that even if this argument is not based in natural rights per se, it nonetheless falls into a naturalistic fallacy of a different sort, in that it subscribes to an essentialist view of human nature and ignores the endogeneity of creative practice. A naturalistic conception of human creativity can even cut the other way: If creativity is a constant, who is to say that a regime of maximalist copyright will not yield unprecedented creative fruits? Law can reshape behavior with respect to the cultural environment, but that does not mean that creative practice will disappear. Indeed, pro-commodificationists argue just this.

In one sense, this objection is right. Artistic culture will not cease to evolve or to produce new and adventurous works even under conditions of more pervasive commodification. As postmodernist theory reminds us, under such conditions creative practice will simply seek new outlets.¹⁰⁵ We might safely posit, moreover, that creative practice will still be characterized by a pattern of 'normal science' intermixed with larger representational shifts, and will continue to manifest a resulting diversity. Within mainstream artistic culture, for every *n Joeys* or *Fear Factors*, there will be a *Six Feet Under* or *Sex in the City* to take critics and audiences by surprise. Other

102. See Csikszentmihalyi, *supra* note 82, at 47–50, 53–55.

103. Heightened transaction costs to users arise principally from the need, whether real or perceived, to negotiate permissions processes and to predict *ex ante* the sort of access one expects to require. Csikszentmihalyi reports that, based on creative practitioners' own accounts, the success of the creative process hinges in part on the ability to avoid distractions. Csikszentmihalyi, *supra* note 82, at pp. 120–121.

104. An earlier, abbreviated version of this argument appears in Cohen, *Perfect Curve*, *supra* note 43; see also N. Elkin-Koren, 'Copyrights in Cyberspace – Rights Without Laws?', 73 *Chi.-Kent. L. Rev.* 1155–1201 (1998).

I do not mean any of this to imply that creative practice cannot occur within corporate environments, among a more limited circle of collaborators. It does suggest, however, that special care must be taken in structuring the corporate environment to facilitate the activities and interests, including the non-monetary interests, of creative employees. For further discussion on this point, see R. Cooper Dreyfuss, 'The Creative Employee and the Copyright Act of 1976', 54 *U. Chi. L. Rev.* 590–647 (1987). Some corporate environments, such as Xerox PARC and IBM's Almaden Research Center, have been consciously designed with this goal in mind.

105. See generally: Coombe, *supra* note 70.

types of creative practice will continue outside the market system. To the extent that commodification requires both standardization and enforceability, it can't capture all of the ways in which preexisting cultural referents are invoked, with or without permission from their designated owners.

Ultimately, however, reliance on the resilience of creativity and creative practice to justify setting law and creative practice at odds seems profoundly misguided. There is abundant and growing evidence, across many different sectors of creative activity, of the price we pay for fear of copyright infringement lawsuits.¹⁰⁶ Psychologists studying the origins of creativity also have studied the ways in which environmental factors can stunt creativity, and have concluded that tying extrinsic motivation and controls too tightly to the conceptual stages of the creative process can both undermine motivation and diminish the creativity of the resulting work product.¹⁰⁷ The pro-commodificationist/cultural stewardship model of the public domain, which posits that heightened control over downstream uses of creative materials will increase creative 'progress,' would do well to take note of these results.

At bottom, my argument is a normative one. As David Lange and Eben Moglen have so eloquently argued, access to the cultural public domain is a matter of status, not of property.¹⁰⁸ Commodification of artistic culture places the law in opposition to the inherent creative faculties and tendencies that define what it is to be human and to exist in human society. This devalues what we purport to prize. If we as a society really wish to encourage creative practice, there is something perverse about adopting a legal regime that throws up omnipresent roadblocks to it. Instead, we need to decide which legal definition of the cultural public domain will produce the best set of conditions for creative practice generally. Although there are inherent tensions between a regime of ownership and conventions of opportunistic borrowing, copyright law's conception of the common in culture should align with creative practice to a far greater degree than it currently does.

106. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 (11th Cir. 2001) (Marcus, J., concurring) (describing testimony of author Pat Conroy about restrictions that the Margaret Mitchell estate sought to impose on would-be writers of the 'official' sequel to *Gone With the Wind*); P. Aufderheide and P. Jaszi, *Untold Stories: Creative. Consequences of the Rights Clearance Culture for Documentary Filmmakers*, Washington D.C., American University, 2004; L. Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York, Penguin Press, 2004; <www.illegal-art.org/>.

107. See: Amabile, *supra* note 82, at pp. 115-120, 231-232.

108. D. Lange, 'Afterword', 66 *L. & Contemp. Probs.* 463-483 (2003); E. Moglen, 'Anarchism Triumphant: Free Software and the Death of Copyright', in N. Elkin-Koren and N. Weinstock Netanel (eds.), *The Commodification of Information*, The Hague, London, Boston, Kluwer Law International, 2002, p. 107; cf. Lessig, *Future of Ideas*, *supra* note 43.

4. THE PUBLIC DOMAIN (AND COMMODIFICATION) RECONSIDERED

We return, finally, to the problem with which we began: how to understand the relationship between the public domain and the trend toward increased commodification in copyright law. The exploration of creative practice undertaken in Part 3 suggests that the copyright system should locate the ‘public domain’ very differently than it does. The common in culture is not a discrete preserve, but rather a distributed property of social space. Copyright law’s construction of the relationship between the public and the proprietary should reflect the need for access to the distributed network of creative resources that produces and is produced by creative practice. This Part offers a different organizing metaphor for that project: that of the cultural landscape. This metaphor requires a rethinking of the doctrines that determine copyright breadth and depth during the copyright term. It also provides a more coherent framework for explaining the dangers that the commodificationist project poses.

4.1. FROM THE PUBLIC DOMAIN TO THE CULTURAL LANDSCAPE

If one asks where the common in artistic culture may be found, the answer, quite simply, is that it is everywhere the public is, and that unplanned, fortuitous access and opportunistic borrowing are matters of the utmost importance. Applying these insights, we can construct a new model of the relationship between the public and proprietary in copyright law, which I will call the *cultural landscape* model. The entitlements described by this formulation do not comprise a geographically or ontologically separate entity; instead, they are baseline rights of access to and engagement with the cultural landscape in which we all exist.

A useful starting point for this reformulation is James Boyle’s call for a ‘legal realism for the public domain’ that hinges on disaggregation of the notion of publicness and recognition that ‘many “public domains”’ exist.¹⁰⁹ Some cultural resources will be partially or differently ‘public,’ and Boyle argues that this should not trouble us. As Boyle’s nod to the Hohfeldian disaggregation of property implicitly recognizes, partially or differently public without the correlative partially or differently private is a *non sequitur*. Some cultural resources will be partially or differently private, but which? Those resources whose owners choose to administer them that way, or others as well? If only the former, geographic separation of the public from the private is (paradoxically) preserved. Boyle’s endorsement of Yochai Benkler’s vision of ‘a predictive, critical conception of the public domain,’ based on the range of uses that the public is privileged to make, hints at a very different vision.¹¹⁰ Employing the language of symbolic logic rather than that of geography, one might formalize that

109. Boyle, *supra* note 17, pp. 67-69.

110. *Id.* at 68; see Benkler, *Free as the Air*, *supra* note 2.

vision by saying that the public domain is the domain of accessible knowledge.¹¹¹ But (as Boyle is well aware) even academics and judges, who are accustomed to such abstractions, do not think in symbolic logic or Hohfeldian correlatives and superimpose metaphors later; instead, it is the metaphors that do the mediating.

Another useful point of departure is Pamela Samuelson's conception of the public domain as comprising a 'core' and a number of 'contiguous terrains,' including a terrain 'consisting of some intellectual creations that courts have treated as in the public domain for some, but not all, purposes.'¹¹² In fact this formulation describes many of the contiguous terrains on Samuelson's map; partially or differently private is more the rule than the exception. More generally, as Samuelson's exposition of the map reveals, the terrains inside and outside the core overlap, merge and diverge in ways that we would not expect to see if public and private terrains were formally separate. These descriptions hint at a visual rendering of the 'public domain' that is not so much a map as a complex topology layered over and under and around domains that are 'private.'

In both of these important explorations of the relationship between the public and the proprietary, the 'public domain' metaphor stands revealed as doubly inapt. Just as the common in artistic culture is not a separate domain in the geographic sense, neither are the cultural resources that comprise it only those that we identify as 'public' with respect to ownership. An affirmative legal conception of the common in culture that respects creative practice will not flow from reifying the 'public domain' as such, but rather from adoption of an organizing metaphor that more clearly rejects formal and experiential separation. The cultural landscape is defined not by ownership status, but by the practical accessibility to creative practitioners of resources within it, including resources that copyright law counts as protectable and proprietary expression. This landscape is not static, but dynamic and relational; like the physical landscape, its perceived contents will vary as a function of both time and subjectivity (or collectivity). To facilitate creative practice, materials in the cultural landscape need to be legally as well as practically accessible, though they may be partially or differently accessible. Formulating rules that preserve the experiential baseline is copyright law's great challenge.

Locating the public aspects of culture in the cultural landscape also enables a conceptually coherent response to the constituent puzzles of the commodification problem: Commodification radically alters the public's relationship with the cultural landscape because it systematically reverses all of the implicit presumptions that individuals have historically brought to their experience of and participation in the development of culture. Each of the four puzzles describes an aspect of this reversal. Extensions of copyright duration threaten access to the cultural landscape because they substitute a presumption of ongoing private control for the richly uncontrolled opportunism of creative license. The progressive narrowing of copyright's exemp-

111. G.B. Dinwoodie and R. Cooper Dreyfuss, 'Patenting Science: Protecting the Domain of Accessible Knowledge', this volume, p. 191.

112. Samuelson, *supra* note 2, at pp. 148-151.

tions and limitations and the inexorable expansion of copyrightable subject matter eliminate safety valves that have developed to mediate the tension between the legal fact of proprietary expression and the social fact of creative practice. The threat posed by the DMCA's anti-device provisions is different but equally immediate; the cultural landscape is defined not only by its existence, but also by its practical accessibility.

As copyright increases in length, breadth, depth, and strength, creative practice is squeezed to the margins. The costs of this displacement cannot be comprehended strictly in political or aesthetic terms, although those are significant costs.¹¹³ Set against the backdrop of the habitual creative practice of both artists and ordinary people, a set of legal rules that asks people to adopt a permissions-based approach to their own cultural environment is inhumane and nonsensical. The changes wrought by commodification may be productive in one sense, but it is a productivity that concerns itself with the shadow of creativity rather than its substance.

The cultural landscape model inverts the traditional understanding of the public domain, in that the arguments for freedom to undertake creative borrowings are at their strongest in the case of mass culture, whether old or new. Yet that makes good sense. What is most firmly rooted in the public consciousness is not Shakespeare or Homer (except, perhaps, in the archetypal sense), but the products of culture industries ranging from Disney and AOL-Time-Warner to the Catholic Church and madrasas of radical Islam. The realm of copyrighted mass culture is also the realm in which there is the strongest need for legal safe harbor, because it is the arena in which one can be least sure of being protected by norms of borrowing that characterize both 'elite' and 'indigenous' cultural forms.¹¹⁴

Disdain for mass culture is in vogue among copyright scholars, particularly those of the conservancy/anti-commodificationist persuasion, but it is shortsighted. Although the flowering of amateur culture enabled by the Internet offers exciting possibilities, mass culture is, for better or worse, an equally vital part of the cultural landscape. Economically-minded scholarship addressing the so-called 'solidarity goods' phenomenon recognizes this, but then misses the point by complaining about the very attributes that make solidarity goods valuable: their standardization and their unregenerately middlebrow appeal.¹¹⁵ Paeans to amateur culture, meanwhile, often fail to note that many of the forms of expression they cite as representatively amateur – musical 'mash-ups', compilations of information about movie and CD releases, weblog reproductions of articles culled from the mainstream media, and

113. See, e.g., Benkler, *Free as the Air*, *supra* note 2; N. Weinstock Netanel, 'Copyright and a Democratic Civil Society', 106 *Yale L.J.* 283-387 (1996); M.J. Madison, 'Complexity and Copyright in Contradiction', 18 *Cardozo Arts & Ent. L.J.* 125-174 (2000).

114. For useful discussions of those norms in the context of musical borrowings, see Arewa, *Musical Borrowing*, *supra* note 67; Negativland, *supra* note 67.

115. See: G. Pessach, 'Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities', 76 *South California L. Rev.* 1067-1104 (2003).

the like – build from a foundation laid by mass commercial culture.¹¹⁶ All of this adds up to the conclusion that some degree of shared orientation to mass commercial culture is both inevitable and good, for amateurs as well as information plutocrats, and should be distinguished from the relative lock-in produced by copyright rules that place large sectors of the cultural landscape off limits to would-be borrowers.

It is this lock-in that a cultural landscape model should be tailored to address, by mediating between the competing realities of the economic organization of culture and the lived experience of individuals and groups. Jessica Litman observed in 1990 that the separateness of the public domain was at its inception little more than a highly useful fiction.¹¹⁷ As copyright expands, and as mass copyrighted culture increasingly saturates the cultural landscape, that fiction is no longer sufficient to protect and preserve widespread public access to the raw materials of creative practice.

4.2. RECOGNIZING THE CULTURAL LANDSCAPE

Recognizing the cultural landscape demands a re-conception of copyright as incompletely commodified by design and more fundamentally by necessity. Translating this conception into practice will require both changes in interpretive stance and changes in underlying doctrine.¹¹⁸ In their modern incarnations, the rights to prevent ‘copying’ and to control the creation of ‘derivative works’ recognize few boundaries. They are drafted extraordinarily broadly in the first instance, and have been extended even more broadly by the courts.

To begin, it is important to appreciate just how minimally copyright doctrine permits access to the cultural substrates essential to creative practice. Conventional wisdom holds that rights of access to cultural raw material are preserved by the ‘idea-expression dichotomy’ and its corollary principles of merger and *scenes a faire*,¹¹⁹ but this access is more myth than reality. The merger doctrine permits copying of expression when there are so few ways of expressing the underlying idea that use of the expression is, as a practical matter, necessary. Courts interpreting the idea-expression dichotomy increasingly use merger as a limiting principle, and therefore extend copyright protection to anything for which variation was possible.¹²⁰ The *scenes a faire* doctrine, which is premised on a weaker conception of necessity dictated by audience expectation, permits copying of so-called ‘stock’

116. See, e.g., D. Hunter and F.G. Lastowka, ‘Amateur-to-Amateur’, 46 Wm. & Mary L. Rev. 951 (2004).

117. Litman, *The Public Domain*, *supra* note 17.

118. In the era of global copyright, these changes must occur in parallel at the national and international levels, but I will leave that discussion for another day.

119. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 217, 219 (2003); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 580-582 (1985).

120. See, e.g., *American Dental Ass’n v. Delta Dental Plans Ass’n*, 126 F.3d 977, 980-81 (7th Cir. 1997); see also: *CCC Info. Svcs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 68-73 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995).

literary devices and standard technical features.¹²¹ Even the latter doctrine, however, often rests on far too narrow a conception of the necessity that animates creative practice. Thus, one federal appeals court has held that a technical practice encoded in software cannot be considered *scene a faire* unless the plaintiff copyright owner also experienced it as dictated by industry standards, a rule that would preclude standard status for anything newly developed.¹²²

The necessity that drives creative borrowing, and that copyright law should more fully reflect, is not the material's or the audience's but the creative practitioner's, and 'necessity' is probably the wrong word in any event. We might say that materials drawn from the cultural landscape are necessary inputs by virtue of their having been selected as inputs, but that usage strains ordinary meaning too far. It is simpler and more honest to say that borrowing from the cultural landscape should be deemed permissible in some circumstances because that is what people do, and because allowing people to do what they do has produced, over the centuries, artistic and intellectual expressions of breathtaking variety, beauty, and power in cultures the world over.

For similar reasons, the fair use doctrine also can't carry the burden of preserving rights of access to the cultural landscape. The primary weakness of the fair use doctrine is neatly encapsulated in the Second Circuit's decision in *Castle Rock v. Carol Publishing Co.*,¹²³ a case involving the right to publish a trivia guide to a popular television show. The court reasoned that 'derivative works that are subject to the author's copyright transform an original work into a new mode of presentation, [but] such works – unlike works of fair use – take expression for purposes that are not "transformative."' In a footnote, it added: 'Indeed, if the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, does not infringe the copyright of the original work.'¹²⁴ In other words, the universe of recognizable borrowings contains only two categories: derivative works (not transformative) and fair uses (transformative but still recognizable). Fair use is the inverse of derivative rights, which is another way of saying both that derivative rights have no logical boundaries of their own and that fair uses must necessarily be few and far between. If the law defines derivative rights broadly to encompass a near-absolute right of exclusion from all reasonably related markets, there will be little left for fair use to do. As we might suspect, the inquiry into 'transformative'

121. See, e.g., *A.A. Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.) ('Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices, we have held that *scenes a faire* are not copyrightable as a matter of law.'). *cert. denied*, 449 U.S. 841 (1980); *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 709-10 (2d Cir. 1992) (applying this reasoning to computer program elements 'dictated' by factors such as compatibility requirements and customer demand).

122. See: *Dun & Bradstreet Software Services, Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2075 (2003).

123. *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2d Cir. 1998).

124. *Id.* at 143 & n. 9.

use increasingly imports considerations of necessity similar to those that apply in the idea-expression setting.¹²⁵

As Rebecca Tushnet has observed, moreover, recent efforts to save fair use by grounding it in the first amendment may end up narrowing fair use considerably. One may need to ‘make other people’s speeches’ for a variety of reasons that first amendment theory either does not recognize or recognizes only at considerable cost to its own internal coherence.¹²⁶ It is worth observing, too, that resort to the first amendment creates an imperative to describe claimed fair uses in ways that are manifestly inaccurate. Alice Randall’s novel, *The Wind Done Gone*, is not (only) a parody of *Gone With the Wind*, but rather a work far more complex in scope and ambition. The pressure to describe this work as something that it is not, and as something manifestly less subtle than it is, does it great violence, and teaches later authors to avoid subtleties that might call the ‘parody’ categorization into question.¹²⁷

Instead, as perceptive commentators have begun to urge, the solution to copyright’s overgrowth lies in a more disciplined approach to the basic rights themselves. With respect to copying, Ann Bartow has argued eloquently for judicial restraint in application of the substantial similarity doctrine.¹²⁸ In particular, it is hard to imagine how artists associated with defined schools or genres, such as impressionism or cubism, would have avoided current interpretations of that doctrine to extend protection to artistic style.¹²⁹ As several other commentators have recognized, making space for creative practice also requires more comprehensive limitations on the statutory grant of derivative rights.¹³⁰ The term ‘derivative work’ and accompanying statutory definition were intended to supply a medium- and technology-neutral framework that would cover a broad range of adaptations. However, the result has been a right that increasingly seems to encompass any recognizable adaptation of or reference to copyrighted expression.

One persuasive proposal for limiting derivative rights comes from Tyler Ochoa, who observes that some applications of derivative rights are troubling because they seem to allow copyright owners to reach even individual manipulation of creative works.¹³¹ Ochoa’s careful exposition of the problem suggests that derivative rights

125. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994) (‘Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.’).

126. R. Tushnet, ‘Copy this Journal: How Fair Use Doctrine Harms Free Speech and How Copying Serves It’, 114 *Yale L.J.* 535-589 (2005).

127. For more detailed discussion of this point, see Note, ‘Originality’, 115 *Harv. L. Rev.* 1988-2008 (2002).

128. A. Bartow, ‘Copyrights and Creative Copying’, 1 *U. Ottawa L. & Tech. J.* 75-103 (2003-04).

129. See, e.g., *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

130. See, e.g., L. Pallas Loren, ‘The Changing Nature of Derivative Works in the Face of New Technologies’, 4 *J. Small & Emerging Bus. L.* 57-93 (2000); R. Okediji, ‘Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace’, 53 *Fla. L. Rev.* 107-181 (2001), at pp. 140-143.

131. T. Ochoa, ‘Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or Does the Form(Gen) of the Alleged Derivative Work Matter?’, 20 *Santa Clara Cptr. & High Tech. L.J.* 991-1044

were most likely intended principally to safeguard the other four exclusive rights, and that courts recognizing freestanding derivative rights may have gone beyond what Congress intended. His proposal to reconceive derivative rights as dependent rights would shield many private or consumptive alterations of copyrighted works.

Tying derivative rights more closely to the other copyright rights, however, by itself would not be enough to secure baseline rights of access to the cultural landscape, because it would not address the problem of ever-expanding liability for creators of mass-distributed works that invoke, in same way, the content of preexisting cultural raw materials. Here what matters most, and cannot be avoided, is the extent of a creative work's availability for borrowing and/or reworking: in other words, the questions that are commonly perceived to lie at the derivative work right's economic and moral core. If copyright law is to recognize a right of creative access to the cultural landscape, it is precisely this right that must be limited, yet that is precisely what copyright law increasingly refuses to do. Instead, conventional wisdom holds that any curtailment of derivative rights would reduce 'incentives' to invest in works of mass culture.¹³² This argument is to some extent normative (and to that extent it is addressed above) and to some extent instrumental; the line between desirable and undesirable truncation of 'incentives' is difficult to discern.

The solution to this problem, though, is not to throw up one's hands and declare that the economic rights of copyright owners cannot be limited in any principled way and therefore should not be limited at all. As the Creative Commons model shows, there are other, entirely defensible, ways of apportioning the derivative work right.¹³³ For example, one might think it desirable, for either economic or moral reasons, to treat noncommercial reworkings one way and commercial reworkings another.¹³⁴ There are many possible ways of doing this. Commerciality might be determined, as is conventional in many other contexts, by asking whether the second-comer intends to profit from the reworking. Alternatively, a commercial-noncommercial distinction might be drawn to place painting, sculpture, and similar limited-edition efforts on the noncommercial side of the line along with not-for-profit reworkings even though works in the former category might be sold. Commercial reworkings could be subject to a property rule, as is currently the case, or could be allowed upon satisfaction of some nondiscriminatory threshold criterion, such as payment of a fixed fee or passage of a certain period of time.¹³⁵

(2003).

132. The classic form of this argument is Paul Goldstein's. See: P. Goldstein, 'Derivative Rights and Derivative Works in Copyright', 30 *J. Copyright Soc'y* 209-242 (1983), at p. 227.

133. See <creativecommons.org/license/>.

134. For an insightful discussion, see Litman, *supra* note 43, at pp. 180-182.

135. Lawrence Lessig reminds us that many resources considered 'commons' are subject to such rules. Lessig, *supra* note 43, pp. 19-20. If a fee-based process were thought to pose too great a barrier to access, an artists' fund created via levy may provide a partial solution. For a concise treatment of the use of 'artificial lead time' to mediate the incentives/access problem see J.H. Reichman, 'Legal Hybrids Between the Patent and Copyright Paradigms', 94 *Colum. L. Rev.* 2432-2558 (1994), at pp. 2547-48.

Arguably, even a commercial/noncommercial distinction is insufficiently nuanced to adjust to the many forms that creative practice takes. By focusing first on (admittedly crude) categories of creative practice rather than on market-driven categorization, one could generate a more detailed set of categories – for example, sequels, audiovisual adaptations of literary works, fine art interpretations of material from literary or cinematic works, mass-market interpretations of such material (e.g., toys), reference guides, and so on – and develop slightly different rules for each category. For US copyright scholars, this suggestion will be powerfully counterintuitive, because it evokes the much-reviled categorical structure of the 1909 Copyright Act. It is worth remembering, however, that it is not the 1909 Act's formalism but rather the 1976 Act's functionalism that has gotten us into the current predicament. It is long past time to acknowledge that the legal realist turn in intellectual property thinking, as in property thinking, may not have had the moderating effect that its initiators intended.¹³⁶ In addition, there are other ways of tempering perceived costs to authors' rights. For example (and, once again, as the Creative Commons model allows), the law could acknowledge the sense of authorial ownership in creative works, even works of mass culture, by requiring that secondcomers give appropriate credit for certain types of reworkings.¹³⁷

One reasonable question is whether the growing success of the Creative Commons movement, which is premised on voluntary adoption of many of these limits, might make formal limitation of derivative rights unnecessary. As already discussed, however, the cultural landscape cannot be defined without reference to works of mass culture, including mass copyrighted culture. Widespread adoption of the Creative Commons framework by amateur authors will not guarantee sufficient access to large sectors of the cultural landscape – unless proprietors of mass copyrighted culture also opt in.

To be sure, limiting derivative rights in any of the ways suggested here would affect the 'level' and 'direction' of investment in creative works of mass culture.¹³⁸ It is far from clear, however, that this objection should matter when weighed against the extent of copyright law's mismatch with creative practice. Current creators may demand certainty and completeness of entitlements, but future creators require leeway to imitate, borrow, and rework. A copyright law that is faithful to creative practice must honor both demands.

136. Compare, e.g., F.S. Cohen, 'Transcendental Nonsense and the Functional Approach', 35 *Colum. L. Rev.* 809 (1935), at pp. 816-817 ('It does not follow, except by fallacy of composition, that in creating new private property courts are benefiting society.'). *with*, e.g., Goldstein, *supra* note 132, at 217 ('[The reproduction and derivative work rights] give a prospective copyright owner the incentive to make an original, underlying work, the exclusive right to make new, successive works incorporating expressive elements from the underlying work, and the incentive and exclusive right to make still newer, successive works based on these.').

137. For a similar suggestion, see D. Lange and J. Lange Anderson, *Copyright, Fair Use, and Transformative Critical Appropriation*, Working paper 2002, at p. 26, <www.law.duke.edu/pd/papers/langeand.pdf>.

138. Goldstein, *supra* note 132, at p. 227.

4.3. THE POSTCOLONIALIST CRITIQUE

A cultural landscape model of the public aspects of culture must contend, finally, with a powerful critique from the left. This critique is grounded in the postcolonial studies movement, and maintains that the debate about the scope of copyright rights and limitations is addressed exclusively to the concerns of the industrialized world. An especially thoughtful statement of this position comes in a recent article by Anupam Chander and Madhavi Sunder, who argue that the ‘romance of the public domain’ is itself a powerful instrument for subordination of non-Western cultures.¹³⁹ As Chander and Sunder explain, the legal construct of the public domain systematically operates to facilitate exploitation of traditional and/or collective forms of cultural expression by outsiders, while at the same denying the originating cultures the opportunity to control or at least profit from the exploitation.

Chander and Sunder are, without a doubt, correct to argue that the public domain movement, as currently conceived, is no friend to traditional cultures. As they recognize, however, the public domain movement and the indigenous rights movement are not necessarily incompatible. The postcolonialist critique does not entail a rejection of the public domain, but only of a particular, categorically absolute way of thinking about it. Advocates of traditional cultures have a comparatively modest claim to press. They simply seek to recapture for indigenous societies some measure of control over exploitation of their cultural products by outsiders.¹⁴⁰ Their embrace of intellectual property is partial and deeply ambivalent, but it is an embrace nonetheless. In this respect, the postcolonialist critique echoes the critical race theorists’ response, several decades ago, to proclamations by the critical legal studies movement about the ‘death of contract’ and the irrelevancy of rights.¹⁴¹

Thus understood, the postcolonialist critique of the public domain suggests a targeted reformulation that has much in common with the cultural landscape approach proposed here. Both approaches seek to complicate copyright, replacing its foundational private/public dichotomy with a more complex and fertile mix of rights and privileges. Implementing the cultural landscape model would entail recognition that some ‘proprietary’ cultural resources are partially (and differently) public; addressing the postcolonialist critique would require recognizing some ‘public’ or ‘communal’ cultural resources as partially (and differently) private.¹⁴² Conceptually, the two approaches are more consistent than contradictory, and might easily be paired with one another.

139. A. Chander and M. Sunder, ‘The Romance of the Public Domain’, 92 *Cal. L. Rev.* 1331-1373 (2004); see also: Arewa, *Cultural Hierarchies*, *supra* note 72; R.J. Coombe, ‘Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property’, 52 *DePaul L. Rev.* 1171-1191 (2003).

140. See: Chander & Sunder, *supra* note 139; Coombe, *supra* note 139.

141. See, e.g., P.L. Williams, *The Alchemy of Race and Rights*, Cambridge (Mass.), Harvard University Press, 1991, pp. 146-154.

142. Chander & Sunder, *supra* note 139, at pp. 1354-1372; cf. Ostrom, *supra* note 56 (suggesting economic criteria for narrowing the ‘public’ to which particular portions of the public domain belong).

5. CONCLUSION

Beliefs about what legal definition the public domain requires depend crucially on implicit preconceptions about what a 'public domain' is. I have argued that the term 'public domain' is burdened with associations more broadly congruent with the pro-commodificationist project than is commonly acknowledged. More fundamentally, I have argued that the right approach to the relationship between the proprietary and the public in copyright law is not to be derived by interrogating nineteenth-century legal concepts, nor by studying markets for creative products or modeling information as an autonomous system, but rather by more careful attention to creativity as a social phenomenon manifested through creative practice. The preliminary outline of a social theory of creativity offered here has emphasized the relational, emergent nature of creative practice. Much work remains to be done in understanding and elaborating the creative process. It seems, however, that the public domain may require not so much a reification as a reformulation. Experientially, the common in culture is distributed and disaggregated. It is neither geographically nor formally separate, nor is it composed only of that which is publicly owned. If so, the legally constituted common should both mirror and express this disaggregation. The cultural landscape is a likely candidate for both jobs.