

This printable version was created under a Creative Commons Attribution NonCommercial ShareAlike license (see www.juliecohen.com)

3

Copyright, Creativity, and Cultural Progress

Both in the U.S. and globally, the past few decades have witnessed a significant expansion of legally-conferred control over copyrighted content. Copyright attaches to a bewildering variety of human creations, ranging from novels and paintings to blog posts and snapshots. In the wake of recent term extensions, copyright also lasts longer than ever before. The rights conferred by copyright have become inexorably broader, encompassing nearly all secondary uses and adaptations of copyrighted content. Meanwhile, the exceptions and limitations to copyright that previously existed within national laws have been progressively narrowed.

One especially noteworthy casualty of copyright expansion is copyright's traditional but largely implicit public-private distinction, which historically shielded many individual uses of copyrighted works from liability. Today, copyright policy makers are increasingly disinclined to think that the law should privilege personal acts of copying, performance, or adaptation of someone else's copyrighted content. According to the former U.S. Register of Copyrights, digital communication networks and technologies "seamlessly" transform acts of private copying into acts of public distribution—acts, that is, in public and with public consequences.¹ This perspective suggests that in the digital age, copyright infringement liability should extend broadly.

Copyright scholars vehemently disagree on whether current copyright laws strike the right balance between authors and the public. Even so, Anglo-American copyright is premised on a set of assumptions about the relationship between copyright and creativity that most scholars largely accept: copyright supplies incentives for authors to produce creative work, but the creative process is essentially internal and unknowable. Because of the incentives it supplies to authors, copyright promotes the widespread dissemination of knowledge and learning to the public, and that process runs largely one way; authors produce knowledge and the public receives it. Copyright's incentive scheme also promotes the continual forward march of creative and intellectual progress. Because copyright attaches only to creative expression and not to underlying ideas, functional principles, and the like, properly tailored copyright protection can avoid frustrating the needs of future authors. And because ideas and other noncopyrightable subject matter exist in the public domain, they are freely accessible to everyone.

This account of cultural development is incomplete in every critical respect. First, copyright scholars have not been particularly interested in understanding creative practice—in what it is that the people we call authors actually

do on a day-to-day basis. Creativity is constantly invoked by copyright lawyers, lobbyists, judges, and scholars to explain their arguments and decisions, but it is never really explored. Second and relatedly, although users of copyrighted works play important roles both as audiences and as future authors, copyright theory and jurisprudence have evinced little interest in understanding how users assimilate culture and whether that process is as passive as copyright's incentive story supposes. Third, despite equally obligatory invocations of "progress," we know very little about how cultural progress actually proceeds or about how copyright law affects its direction and content. Fourth, copyright's model of the process of cultural transmission, which depends centrally on the abstract concept of the idea-expression distinction, is highly artificial and conflicts with a large body of evidence about the way that cultural transmission actually works. The equally abstract concept of the public domain suggests a distribution of cultural resources that corresponds poorly to the cultural reality that users and authors alike must negotiate.

This chapter explores the gaps in copyright's implicit account of creativity and cultural development, and links them to a set of core commitments that unite copyright maximalists and minimalists alike. Copyright theory and jurisprudence are powerfully structured by the tenets of liberal political theory, which generate a set of presumptions about the appropriate tools for understanding the interactions between copyright and culture. Those presumptions define the boundaries of copyright's epistemological universe in a way that excludes many other approaches to investigating and theorizing about creative processes. The result is that copyright theory remains impoverished in important and outcome-determining ways.

The Subject of Copyright: The Creativity Paradox

Within most accounts of copyright, the phenomenon of human creativity is central to copyright's project of promoting artistic and intellectual progress. Creativity is the fuel that powers the copyright system; without it, there would be nothing to which copyright's incentives could attach. But both copyright scholarship and copyright policy making have proceeded largely on the basis of assumptions about what creativity is and how the fruits of creativity are transmitted. Those assumptions take the form of stylized, oversimplified models of authors and users, and of the presumptively separate roles that each group plays within the copyright system. Within the framework of liberal individualism that Chapter 1 described, that approach is unsurprising. Probing the relationships between authors, users, and culture more carefully might uncover relationships and patterns of influence inconsistent with liberalism's foundational presumption of separation between self and society. As a result of its failure to ask such questions, however, legal talk about creativity is trapped in Plato's cave; it purports to have divined creativity's ideal institutional form, but captures only its shadow.

Within contemporary copyright jurisprudence, the copyrightability of a "work of authorship" is determined in the first instance by evaluating the "originality" of the work itself—that is, by focusing on the end product rather than on the process that led to its creation.² There are good historical reasons for this rule. As both Justin Hughes and Oren Bracha have observed, copyright law's

law's focus on the work enables the copyright system to assign rights without relying on problematic eighteenth-century concepts of romantic authorship. Bracha notes, as well, that the doctrinal emphasis on works of authorship that emerged within late nineteenth-century copyright law accorded with the nineteenth-century liberal ideology of propertization, and that, historically speaking, it is well-suited to an age in which much authorship is corporate.³

The turn away from authorship in copyright doctrine is only partial, however. To resolve copyright disputes, courts and commentators return over and over again to concepts of authorship. In cases involving competing claimants to authorship status, such concepts often function as tiebreakers, enabling courts to determine which claimant is the "real" author. Carys Craig shows that in infringement cases, courts implicitly contrast what the defendant did—imitation, improvement, or criticism—with the actions of a "true" author.⁴ Those categories, by necessary implication, say something about what an author does not do: she does not *merely* consume; she does not *simply* copy; she does not *just* improve; she does not *only* deconstruct. But the categories themselves bring us no closer to understanding what an author does and how she does it. Quite the opposite: a doctrinal stance that holds romantic authorship to be irrelevant to copyrightability, all the while admitting preconceptions about authorship through the back door, operates to prevent systematic attention to the ways that authorship works in practice.

Theoretical accounts of authorial entitlement do little to clear up the confusion about the nature of authorship and how it relates to creativity. Rights theorists of all varieties have generally described creativity in terms of an individual liberty whose form remains largely unspecified. For these scholars, the chief worry is that some legal feature of an author's environment—overly restrictive copyright or some form of official censorship—will constrain creativity in a way that leaves society the poorer.⁵ Some scholars working within the domain of rights theory consult self-reports by artists about the nature of the creative process. When asked to discuss the sources of their inspiration, individual artists tend to describe a process that is intrinsically unknowable. When legal scholars invoke these self-reports, however, they add something: they characterize creative motivation as both intrinsically unknowable and essentially internal. Roberta Kwall characterizes creativity as a gift of self, closely akin to and often intended as an act of religious expression.⁶ By directing scholarly attention to the literature on gifts, Kwall's account usefully enlarges the prevailing conception of authorial motivation, but it does little to help situate creativity in the world from which it arises. Justin Hughes relates creativity to real-world experience using a rich set of anecdotes drawn from artistic and scientific history, but his focus remains the individual creator rather than the community in which the creator is situated. He concludes that creativity is "a set of black boxes, one within each of us," that enables the transformation of experience into expression.⁷

Economic theorists of copyright prefer to work from the opposite end of the creative process, seeking to divine optimal rules for promoting creativity by measuring its marketable by-products.⁸ As a general rule, economic analysis 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. Put differently, economics is fundamentally the study of

production rather than creation. Although the force of this distinction is blunted slightly in the age of mass-produced cultural works created for mass audiences, it is still a difference that matters; the initial inspiration must come from somewhere. Practitioners of economic analysis treat creative motivation as both internal and exogenous—a preexisting preference that matters only to the extent that it is presumptively enhanced by the possibility of an economic reward. The details—why someone creates at all and why she creates this rather than that—are irrelevant; it is assumed that market signals will take care of those. As a result, while economic tools may help explain shifts in larger patterns of supply and demand, or the institutional structures that evolve to enable exploitation of particular types of creative resources, they are not very useful for exploring creativity itself. The problem is especially acute in cases of large creative leaps, which by their very nature cannot be predicted from existing patterns.

Some economically inclined critics of maximalist economic models challenge the argument that copyright invariably supplies an incentive to produce creative work. Scholars like James Boyle and Yochai Benkler argue persuasively that sometimes creative motivation has nonmarket origins. But they tend to agree with the maximalists that the specifics of creative motivation are irrelevant. As Boyle puts it, it doesn't matter why people create, only that they do it.⁹ But if creativity is not purely internal—if it is a function of what authors are looking at, reading, and listening to—the details of the creative process matter a great deal.

A great deal of evidence suggests that scholarly assumptions about the intrinsic quality of creativity are too hasty. To begin with, that assumption does not match the experience that artists describe at all. Artists may not be able to tell us why they create, but they can tell us a lot about the where, what, who, and how of particular creative processes—where they were in space and time; what they were looking at, reading, and listening to; who they were talking to; and what insights or experiments sprang from those interactions. And social scientists who study the creative process have found unequivocally that these things matter.¹⁰ Even if inspiration is every bit as unknowable as artists say it is, then, it still ought to be possible to say a lot more about the everyday practice of creative work. It ought to be possible, moreover, to engage in that inquiry while recognizing and bracketing objections to “authorship” as an ontological category. In other words, rather than asking what authorship is, we should be asking what those who work in domains of artistic and intellectual endeavor do on a day-to-day basis. What practices do they engage in while creating? Critically, how do interactions both with other people and with existing cultural artifacts inform creative practice?

Asking those sorts of questions requires us to consider authors as users of cultural works first and creators only second. Here, though, we reach another impasse. The copyright system's account of cultural development is relatively incurious about users and their behavior. It is commonly understood that users of copyrighted works play two important roles within the copyright system: they receive copyrighted works of authorship, and some of them become authors. Both roles further the copyright system's larger project of promoting cultural progress. But neither copyright jurisprudence nor copyright theory has evinced much curiosity about how users perform these functions and about what they might need in order to do so. If copyright concerns the private, inter-

nal relationships between authors and their works, then it makes sense not to think much about users of copyrighted works. But if creative practice arises out of the interactions between authors and cultural environments—if authors are users first—failure to explore the place of the user in copyright law is a critical omission.

Consider two important questions about how users envision and perform their own roles within the copyright system. First, why do users engage in so-called private consumptive copying of copyrighted works? For the most part, copyright doctrine and copyright scholarship answer that question in a way that is resolutely economic (and that the terminology of “private” and “consumptive” presumes): users are motivated by their own personal, private benefit as consumers of artistic and information goods. They copy because getting something for free is better than having to pay for it.¹¹ According to the narrative of this user, whom I will call the “economic user,” it makes sense that private copying should be infringing or should become so as new abilities to exploit markets develop. Because the economic user is not himself an author, and because he is situated within a theoretical framework inclined to view unremunerated appropriation of common resources as tragic, he is generally oblivious to the long-term effects of such copying on authorial incentives.¹² A legal rule defining all copying as infringement (unless excused by a fact-specific defense) solves the incentive problem in a way that benefits the economic user: it keeps prices low and enables information providers to develop product offerings to satisfy user-consumers at different price points.

Second, how do transformative fair uses arise? Judicial and scholarly explorations of transformative fair use posit a very different sort of user than the economic user who informs discussions about private consumptive copying: this user is a dedicated and perceptive cultural critic. To the extent that he copies, he does so in a deliberate way that relates solely to communication of a critical or parodic message.¹³ This user, whom I will call the “romantic user,” is author-like, and so it makes sense that copyright should privilege his creations. While a broad rule privileging transformative fair use might appear to conflict with the incentive principle, judges and scholars all agree that shelter for cultural criticism promotes the progress of knowledge, and that absent such shelter, many copyright owners would not license transformative critical copying. Shelter for transformative fair uses thus serves copyright’s ultimate goals.

There are several curious things about these answers. First, the users they posit are very different from each other—so different that they seem to be completely different people, and to have little to say about behavior outside their home domains. The romantic user cannot point the law toward a different answer to the question why users engage in private consumptive copying, and this is so by choice. The romantic user’s interests lie in the realm of transformation, so he has little to say about either the costs or the benefits that other sorts of private copying might generate. The economic user’s approach to the problem of transformative use is equally unsatisfying. It is widely acknowledged that some fair uses, including many transformative uses, create positive externalities from which society as a whole benefits greatly, and that many such uses would not be made if the users who make them were required to internalize all of the costs. This insight justifies having a fair use doctrine, but it does not tell us how to decide particular cases. Because of the clear mismatch between indi-

vidual and social utility, economically inclined judges and scholars have repeatedly stumbled in their efforts to theorize an economic basis for identifying those uses that are worth privileging.¹⁴

Perhaps the differences between the economic user and the romantic user follow straightforwardly from the fact that activities within the two domains are so different. There are two ways in which this could be true. First, perhaps there are simply two different kinds of people in the world, those who transform copyrighted works and those who consume them. But that hypothesis is both theoretically implausible—how can one transform something without having first consumed it?—and inconsistent with experience. Transformative fair use requires enough consumption for a critical perspective to emerge, and in the Internet age, experiments with transformative use by ordinary consumers are all around us. Alternatively, perhaps users who engage in both types of activities simply approach them quite differently. Perhaps we are romantic about transformation and economic about acts of copying that are unconnected to transformation. But that assumption begs a large and enormously important question about the relationship between consumption and creation, one that the characters of the economic user and the romantic user themselves cannot answer.

In fact, the narrative of the romantic user tells us very little about how and why the users who make fair uses do what they do. In most fair use cases, the identity of the user is known, the use has already been made, and the only question is whether it passes muster. Perhaps for these reasons, courts and commentators evaluating fair use cases tend to talk about uses as *faits accomplis*. Although the fair use analysis requires nods to abstract and general qualities such as commerciality, the question of lawfulness is rarely related in any systematic way to the process that led to the use. Scholarly accounts of the romantic user similarly are more concerned with ends than with means. The romantic user's life is an endless cycle of sophisticated debates about current events, discerning quests for the most freedom-enhancing media technologies, and home production of high-quality music, movies, and open-source software. He knows exactly which works he wants to use and what message he wants to convey. The romantic user therefore is poorly positioned to explain the processes by which access and use become transformation.

The narrative of the economic user tells us equally little about why users copy. We are given to understand that the economic user enters the market with a given set of tastes in search of the best deal. That assumption does not reckon with users themselves or with their reasons for copying in any meaningful way; instead, it obviates the need to ask questions that might reveal a more complex relationship between copying and motivation. Scholarly and judicial discussions of private copying approach user behavior as an aggregate phenomenon to be molded and disciplined. That stance precludes consideration of whether private copying serves other purposes, what those purposes might be, and how we should value them. In particular, we are foreclosed from considering whether there might be a more continuous relationship between the activities of copying and transformation, and whether the midpoints on that continuum might be interesting in their own right.

Ultimately, then, the narratives of the romantic user and the economic user rest on the same assumptions that have animated scholarly discussions

about the nature of authorship. The narrative of the romantic user, which insistently decouples process from end result, returns us to the conception of creativity as fundamentally internal and unknowable. It is that conception, rather than any inevitable reality, that explains why the connections between access and (fair) use, or between copying and transformation, are seemingly opaque and undiscoverable. The narrative of the economic user, meanwhile, returns us by a different route to the assumption that the details of creative motivation are exogenous and therefore irrelevant. In casting users as passive recipients of culture, it ignores critical dimensions of the user's response to creative works. As before, this is a methodological limitation of economics generally. 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. Economics can model aggregate demand, but demand is a poor metric for gauging the extent to which a work captures the imagination. Lacking a window into the imagination, economics cannot illuminate the processes of cultural participation.

Not coincidentally, neither the romantic nor the economic user offers much guidance in resolving some difficult questions that contemporary copyright law must confront. Many contemporary copyright disputes involve fan responses to popular works of mass culture, ranging from fan fiction and videos to user-generated trivia guides to illustrated histories. These works all involve significant components of both copying and creation, and they often can be difficult to characterize as works of criticism. Because copyright's user narratives frame a binary distinction between consumptive and transformative copying, both courts and scholars have had difficulty deciding how to characterize such works. A related set of questions concerns whether and to what extent users should have a right to circumvent technical protection measures, such as the copy-protection system used for commercially produced DVDs, in order to make lawful uses of the underlying copyrighted content. Lacking good models that relate process to end result, courts have cheerfully decreed that the availability of tools for making fair uses is irrelevant, and scholars who think the result should be different have stumbled in trying to explain why.

In short, to develop an understanding of creativity, what is needed is not a better definition of authorship, nor an airtight conception of usership that is distinct from authorship, but rather a good understanding of the complicated interrelationship between authorship and usership, and the ways in which that interrelationship plays out in the cultural environments where creative practice occurs. The task has been so difficult for legal thinkers precisely because the path from access to manipulation to transformation depends in part on considerations that the prevailing models of author and user behavior do not admit. A more useful model would abandon preconceptions about romantic vision and consumptive utility and focus on the related processes of cultural participation and creative practice.

The Social Value (or Cost?) of Copyright

Copyright theory's account of cultural development also depends centrally on the assumption that progress has a single, merit-based trajectory and that a well-designed copyright system simply moves society along that trajectory faster and more effectively. Although some copyright scholars have urged a more critical perspective, most copyright scholars and policymakers strenuously avoid casting doubt on this account of copyright's relation to progress. In particular, although they may disagree on the optimal scope of copyright, most copyright scholars and policy makers are inclined to think that a properly tailored scheme of rights and limitations will produce markets for copyrighted expression that are more or less value neutral. They are deeply suspicious of the role of value judgments about artistic merit in justifying the recognition and allocation of rights, and equally suspicious of postmodernist theoretical perspectives that characterize artistic and intellectual knowledge as historically and culturally contingent. That stance exposes a shared epistemological universe that is relatively narrow and that forecloses potentially fruitful avenues of inquiry into the process of cultural production.

Copyright judges and scholars have struggled mightily to articulate neutral, process-based models of progress that manage both to avoid enshrining particular criteria of artistic and intellectual merit and to ensure that the "best" artistic and intellectual outputs will succeed. The canonical statement of the copyright lawyer's anxiety about the twin dangers of judgment and relativism is Justice Holmes's warning that:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations. . . . At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.¹⁵

On its face, this statement works hard to avoid recognizing particular criteria of artistic and intellectual merit. But it presumes that they exist and that appropriate judgments will be made by audiences competent to do so as long as copyright does not attempt to choose winners in the marketplace of ideas. Copyright scholarship routinely both echoes Holmes's warning and adopts its implicit premises.

In the last two decades, the reigning account of copyright's role in facilitating cultural progress has come under challenge from scholars grounded in contemporary social theory. Peter Jaszi, David Lange, and Martha Woodmansee explored the modernist narrative's implicit dependence upon a vision of the solitary, romantic author, while Margaret Chon interrogated the implicit presumption of singular, teleological progress. James Boyle illustrated the ways in which the construct of the romantic author is deployed to legitimate practices of economic domination, while Rosemary Coombe sought to rehabilitate those marginalized as passive consumers of the fruits of others' romantic authorship. Niva Elkin-Koren extended the critiques of romantic authorship and teleological progress into the realm of political theory, offering an account of progress

as inhering in widely distributed, participatory acts of social meaning making. In addition, work by a number of scholars has explored ways in which copyright's facially neutral categories privilege some forms of artistic expression over others.¹⁶

Rather than treating these critiques of authorship, originality, and progress as an invitation to inquire more closely into the cultural production of knowledge, the mainstream of copyright scholarship has tended to marginalize them. The process sometimes begins with an act of misclassification, in which the emerging corpus of critical copyright theory is identified with "postmodernist literary criticism."¹⁷ That characterization vastly oversimplifies the range of literatures on which the critical copyright theorists rely. It also ignores the fact that scholarly criticism of the modernist model of cultural production includes other, less overtly theoretical strands within the copyright literature, including most notably the important work by David Lange and Jessica Litman on the relation of the public domain to cultural production and by Michael Madison on the ways in which patterns of social and cultural organization shape prevailing understandings of fair use.¹⁸ Misclassification is followed by misreading. Postmodernist literary criticism (or more generally, postmodernism) is taken as holding that texts have no authors and no meaning whatsoever, and the critical theorists are read as adopting a similar stance.¹⁹ The allegation that doctrinal overbreadth stifles productive borrowing is taken as stating a claim about the requirements of "postmodern art" (or "appropriation art"), which is assumed to differ in fundamental ways from art more generally.

Thus characterized, the challenge from critical copyright theory is interpreted as setting up an either/or choice between merit and a pernicious cultural and intellectual relativism. To avoid relativism, one must choose merit. But that choice creates enormous methodological difficulties of its own. In particular, to avoid the tension that endorsement of a substantive vision of progress would create with principles of value neutrality and negative liberty, copyright scholars retreat to a process-based vision of merit. They presume that, under conditions of fair competition, personal decisions about information consumption will produce results that make sense—that the truest and most beautiful works will be the ones that appeal most strongly to the citizen's deliberative faculty or to the consumer's enlightened self-interest. Since it is far from obvious that the real world actually works this way, the turn to process rapidly generates its own anxieties, which revolve around whether the communicative marketplace actually will work as the models predict and what exactly fair competition is.

The resulting disagreements over the optimal structure of copyright rules and markets conceal a broader agreement on first principles, which goes generally unremarked. The unspoken and increasingly frantic dialectic between fidelity to and distrust of the marketplace model of communication that animates so much of copyright scholarship is ideologically motivated at the most fundamental level: it reflects a shared adherence to a rationalist philosophy that conceives of knowledge as transcendent and absolute rather than contingent and evolving. Copyright scholars subscribe to the assumption that a neutral, progress-promoting structure for copyright is achievable because the first-order commitments of liberal theory require it. They disagree chiefly on compara-

tively trifling questions about which market signals are accurate and which mere distortions.

Within the wider landscape of contemporary social theory, however, copyright's internal narrative about the nature of progress and the possibility of value-neutral copyright markets is anachronistic. The understanding of knowledge as transcendent and absolute and the accompanying vision of progress as linear forward motion toward enlightenment have been thoroughly discredited. Contemporary (or postmodernist) views of the evolution of knowledge, and of artistic and intellectual culture, draw attention to the ways in which beliefs about truth and beauty are socially and culturally situated, and shaped by historical, geographic, and material contingencies. Scholars trace the ways that culture emerges from practice and discourse, and that practice and discourse are themselves shaped by cultural and institutional power. Studies of art and science have explored the dialectic between settled truths and disruptive upheavals and have sought to illumine the ways that particular innovations become accepted as truth or enshrined as artistically valid.

Social and cultural theories that emphasize the contingent, iterative, socially situated development of knowledge are rooted in philosophical traditions that liberalism has resisted, and so copyright scholars' reluctance to embrace those theories is unsurprising. But deeper engagement with postmodernist approaches need not lead to the debilitating relativism that copyright scholars fear. In particular, none of those literatures has as its stated purpose the trashing of cultural conventions. To the contrary, they recognize and acknowledge that shared premises generating predictable rhythms are essential to the operation of a functioning society. Bringing critical perspectives to bear on those premises and rhythms is also essential, however. What is most important is that settled modes of knowing not become entrenched and calcified. That concern resonates deeply with copyright law's imperative to foster progress. For that reason, these scholarly approaches are better understood as opening the way for an account of the relationship between copyright and culture that is both far more robust and far more nuanced than anything that liberal political philosophy has to offer.

So understood, the insights of contemporary social theory do not negate copyright's progress imperative, but instead demand two important modifications to it. First, they require that progress be assigned a more open-ended interpretation. Stripped of its association with modernist teleologies, progress consists, simply, in that which causes knowledge systems to come under challenge and sometimes to shift. Second, and precisely because this understanding of progress abandons the comforting fiction of modernist teleologies, a postmodernist approach to knowledge demands careful attention to the ways that law and culture evaluate and reward (or penalize) artistic and intellectual production. Recognizing that those processes cannot help but reflect normative judgments, it directs our attention to the value judgments that they enact. It thereby foregrounds the complex linkages between and among progress, power, and cultural participation.

Copyright's system of incentives and rules is not, and could not be, neutral about the content of progress. A useful model of copyright would take that proposition as the starting point and interrogate culturally situated conceptions of merit more directly. Rather than indulging in elaborate fictions about

the value neutrality of well-functioning copyright institutions, copyright theory and policy should pay attention to the sorts of content that real copyright institutions work to privilege and to the kinds of challenges that they work to suppress.

The Nature of Copyrightable Content

The structure of copyright law reflects not only assumptions about the nature of progress writ large, but also assumptions about the ways that artistic and intellectual culture develops on a case-by-case basis. Copyright scholars of all persuasions articulate a vision of the process of cultural transmission from author to author—of cultural progress writ small—within which abstraction is prized highly and the most valuable aspects of artistic and intellectual culture are those that are most amenable to abstraction. The foundational abstractions within copyright discourse concern the primacy of idea over expression, the primacy of the work over the copy, and the universal accessibility of the public domain. Each abstraction powerfully shapes the legal understanding of the ways that creative practitioners work and the resources that they require.

The commitment to abstraction in modeling cultural transmission is a direct outgrowth of the liberal rationalist tradition and its commitments to the autonomous, disembodied self and the possibility of transcendent knowledge. Within that vision, the concrete forms of cultural artifacts and practices do not matter very much, nor do the spaces within which cultural practices occur. What I want to describe in this section is a process analogous to what Katherine Hayles characterizes as the “platonic backhand,” which “constitute[s] the abstraction as the originary form from which the world’s multiplicity derives,” followed by the “platonic forehand,” which derives from the foundational abstraction “a multiplicity sufficiently complex that it can be seen as a world of its own.”²⁰ Building from its own foundational abstractions, copyright theory derived from within the liberal tradition constructs a model of creative practice that obviates any need to interrogate creative practice more directly.

As every student in the basic copyright course learns, copyright does not protect ideas, and that is because ideas are thought to be the shared raw material of progress. Ideas are what enable subsequent authors to build on the works of past authors, even if the expression in those works is the subject of exclusive rights. The idea-expression distinction establishes the relative value of abstract and concrete components of artistic and intellectual culture and enshrines an assumption, implicit in that privileging, that the two can be neatly distinguished.

When ideas are assumed to be the basic units of cultural transmission, disputes about copyright scope become disputes about identifying those expressions that should be treated like ideas. The “substantial similarity” test for infringement adopts precisely this approach, separating protected from unprotected attributes based on their place within a “series of abstractions.”²¹ The doctrines of merger and *scenes a faire*, which explicitly permit copying of some expression, are justified in the same terms: they identify situations in which copying must be permitted to the extent “necessary” to enable the exchange of ideas.²² Not coincidentally, the necessity formulation shifts the focus away

from both authors and users—from both the particulars of creative practice and the patterns of ordinary use.

In cases involving musical compositions and visual works, the abstractions-based approach creates special difficulties for judges and juries unaccustomed to parsing nonverbal expression in these terms. Judges sometimes resolve these difficulties by decreeing either infringement or noninfringement on an “I know it when I see it” basis.²³ What juries do is anyone’s guess. In other cases, most notably those involving computer software and databases, the term “idea” also encodes a second process of abstraction. As used in copyright case law and within copyright theory, that term denotes not only ideas per se, but also facts, processes, procedures, and methods of operation. Many of these entities are substantially less amenable to abstraction; in particular, procedures and methods of operation expressed in computer microcode and judgments about utility expressed in databases are very difficult to separate from their concrete instantiations. Calling these things ideas makes their concreteness easier to overlook; conversely, emphasizing their concreteness makes it easier to claim that they are not ideas.²⁴

One might think that the cumulative weight of these difficulties would cause copyright scholars to question the value of the abstractions heuristic. In fact, broad agreement as to the separability of idea and expression extends across copyright’s internal methodological divide. To the extent that both rights theorists and economic theorists advocate expanded privileges to copy, they do so by reference to the importance of the free circulation of ideas. Lockean theorists argue that copying is justified to the extent required by the proviso that “enough, and as good” remain for others to use; the idea-expression distinction accomplishes this goal in most (though not all) cases. Free speech theorists link copyright’s goals directly to participation in the exchange of and deliberation about ideas. Economic theorists assume that the freedom to copy ideas minimizes the “deadweight loss” that results from recognizing exclusive rights in expressive works. In particular, economic theorists can reconcile price discrimination with expressive competition only by relying on the free circulation of ideas as the principal vehicle for cultural transmission.²⁵

The problem with all these stories about the primacy of ideas is that they conflict with everything else we know about the processes of cultural transmission. Like copyright scholars, other scholars who study cultural texts (including both conventional literary texts and all other forms of artistic expression) understand those texts as performing a cultural-transmission function. That function, however, resides in the text itself, including idea and expression together. Texts reflect context-dependent meanings rather than invariant ideas, and this means that text and meaning are both inseparably intertwined and continually evolving.²⁶ Secure in their knowledge that the cultural-transmission function performed by artistic and intellectual works resides principally in the ideas conveyed by such works rather than in the particular form of their expression, many copyright scholars scoff at the seeming mushiness of literary theory, art criticism, and the like. But copyright’s model of cultural transmission is created out of whole cloth, based on nothing more than assumptions about the relationship between culture and true knowledge.

Identification of expression divorced from animating ideas as the appropriate subject of ownership reinforces a second process of abstraction,

which identifies the work as the locus in which rights reside. This process of abstraction generates broad rights that negate defenses based on the transposition of expression into different forms. Thus it makes sense to conclude, for example, that the copyrightable expression in a film inheres in its characters in a way that transcends the particular actions scripted for them, or that the copyrightable expression in a novel or television series encompasses the incontrovertible fact that particular lines of dialogue were uttered by particular characters.²⁷ The initial form of creative expression becomes merely an exemplar; even expression is abstracted from itself.

Concrete instantiations of works figure in this analysis primarily as sites of control; the law can focus on regulating the preparation and distribution of copies or the physical rendering of works as performances without worrying much about the form of the copying or the circumstances of the performance. Abstraction from the particularities of format thus leads, paradoxically, toward ever more complete control of things embodying works. At the same time, the concept of the work systematically excludes forms of expression that do not fit the definition. For example, the contributions supplied by an editor or a dramaturge, which may mean the difference between success and failure in the marketplace, typically do not count as manifestations of authorship.²⁸ In other cases, emphasis on the work causes courts to overlook particularities of form that the author claims as expressive, as when a musical composition is deemed to consist solely of its notes divorced from scripted performance elements.²⁹

The third foundational abstraction in copyright doctrine concerns the availability of common cultural resources. The standard account of resource availability within copyright doctrine and theory holds that creators may draw freely from a public domain of old and otherwise uncopyrightable material. In recent years, the public domain has become the object of considerable scholarly attention. Even so, relatively little attention has been devoted to the way that the term “public domain” functions metaphorically to describe the geographic and practical accessibility of the cultural commons.

There are two competing models of the public domain in contemporary copyright law. Both models are dynamic; that is, they attempt to describe changes in the universe of publicly available content over time and to evaluate the effects of these changes for cultural progress and for society more generally. They differ in their normative assessment of the public domain and its role within the overall copyright system. The first, which I will call the conservancy model, holds that expansion of copyright threatens the continued viability of a robust public domain, with adverse consequences for cultural progress. Conservancy theorists view recent expansions of copyright as damaging to patterns of information flow within the copyright system generally. According to these scholars, recent legislative expansions of copyright are best described as series of unprincipled enclosures, or land grabs, by powerful domestic industries.³⁰ The second model, which I will call the cultural stewardship model, paints these changes in quite a different light. According to this model, continued ownership of copyright enables the 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. Adherents of the cultural stewardship model acknowledge the important role that public-domain building blocks play in the ongoing development of artistic culture. They argue, however, that

the idea-expression distinction adequately performs that function and will continue to perform it even if copyright is lengthened and expanded to cover new forms of creative expression.³¹

In the heated back-and-forth over what the public domain does or should contain, both groups of scholars have paid surprisingly little attention to the way that the public domain functions metaphorically to position common cultural resources within a wholly imaginary geography. The space that is the public domain has the Heisenbergian property of being both discretely constituted and instantly accessible to all users everywhere. The metaphoric construction of the public domain as a universally accessible space in turn tends to obscure questions about the practical availability of common cultural resources; it is easy to assume that metaphoric availability and practical availability are one and the same. This enables copyright jurisprudence to avoid coming to grips with the need for affirmative rights of access to expressive resources within the spaces where people actually live. If everyone always has access to the public domain, then broad exclusive rights for copyright owners threaten neither access to the common elements of culture nor use of those elements as the substrate for future creation.

At the same time, scholarly and judicial discussions of the public domain have largely overlooked another spatial metaphor—that of “breathing room” or “breathing space”—that recurs increasingly often in debates about copyright policy, on topics ranging from the nature of authorship to the scope of fair use. In a variety of contexts, both judges and scholars invoke breathing room to refer to the leeway that follow-on creators require to access and reuse creative materials, whether or not those materials enjoy public-domain status. The idea of breathing room for follow-on creativity suggests a very different conceptualization of the relationship between the proprietary and the publicly available, one that is not tied to a particular domain, but rather is defined by the needs of creative practice more generally. For the most part, however, courts and scholars invoke breathing space without interrogating its spatial connotations and without considering what it suggests about the needs of authors and users alike.³²

And so the problem of the public domain links back to the other defects in copyright theory, which relate to the particulars of the creative process. Because the public domain is a construct intended to foster the ongoing development of artistic and intellectual culture, a theory of the public domain should make sense when measured against the ways that creative practice works. As used in copyright cases, the metaphoric model of the public domain both relies on and encourages a sort of magical thinking in which neither the particulars of creative practice nor the needs of users matter much. Like the idea-expression distinction and the work-copy distinction, copyright’s model of the public domain privileges abstraction over concrete, materially embedded reality.

Each component of copyright’s abstraction-based model of cultural production tends to marginalize more concrete questions about how people use culture and produce knowledge and about the conditions that lead to and nurture creative experimentation. The result is a doctrinal framework that obstructs careful examination of creative processes and makes grappling with difficult policy choices in copyright even more difficult than it ought to be. If we are to change direction, exploring the ways that real people located in real spaces ex-

perience and use copyrighted works is essential. Understanding the processes that generate artistic and intellectual change requires careful attention to the ways in which processes of cultural production and transmission are mediated by and through texts, artifacts, bodies, and spaces.

The Challenge for Copyright Theory

If copyright scholars want to know whether copyright doctrines intended to guarantee the continued creation of cultural resources actually do their job—and we should—we should begin by exploring the ways in which copyright’s internal model of creativity, its modernist understanding of progress, and its abstractions-based model of cultural transmission have created blind spots in legal thinking about copyright and culture. It is important to recognize, moreover, that this is not simply a tempest in an academic teapot. Copyright’s theoretical deficit has concrete political and practical implications. Commitments to internalized, unknowable authorship, teleological progress, and abstract, modular culture shape copyright’s rules about scope and infringement and invest those rules with an air of inevitability. Interrogating creative processes and practices more directly would produce a more robust and believable account of creativity and of the pathways of artistic and cultural progress. Chapter 4 takes up that project.

Notes

¹ Peters, “Copyright Enters the Public Domain,” 708. On the public effects of private uses, see also Goldstein, *Copyright’s Highway*, 23-24, 144-46, 199-208.

² *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

³ Hughes, “The Personality Interests of Authors and Inventors,” 119-24; Bracha, “The Ideology of Authorship Revisited,” 112-29, 133-35, 153-56.

⁴ Craig, “Reconstructing the Author-Self,” 228-33.

⁵ See, for example, Gordon, “A Property Right in Self-Expression,” 1555-60; Netanel, *Copyright’s Paradox*, 38-41; Rubinfeld, “The Freedom of Imagination,” 32-43.

⁶ Kwall, “Inspiration and Innovation,” 1951-70.

⁷ Hughes, “The Personality Interests of Authors and Inventors,” 116.

⁸ See, for example, Goldstein, *Copyright’s Highway*, 200-01; Landes & Posner, *The Economic Structure of Intellectual Property Law*, 37-84; Yoo, “Copyright and Product Differentiation,” 214-19.

⁹ Boyle, “Second Enclosure Movement,” 44-49; see also Benkler, *Wealth of Networks*, 91-127.

¹⁰ See Amabile, *Creativity in Context*; Csikszentmihalyi, *Creativity*; Gardner, *Creating Minds*.

¹¹ See, for example, Lemley & Reese, “Reducing Digital Copyright Infringement,” 1373-78, 1391-94. An important departure from the narrative of the economic user is Liu, “Copyright Law’s Theory of the Consumer.”

¹² For an overview of the dominant “tragedy” framework, see Ostrom, *Governing the Commons*, 2-13.

¹³ Finding representative discussions of the transformative user is surprisingly difficult. Users are largely absent from discussions about transformative uses. My claim here is that the latter discussions implicitly presume a user with fully formed intent. See, for example, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579-83 (1994); Leval, “Toward a Fair Use Standard,” 1111-16.

¹⁴ Judge Posner’s complements-substitutes distinction probably comes closest to being workable. See *Ty, Inc. v. Publications International Ltd.*, 292 F.3d 512 (7th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003). That distinction, though, does not tell us what to do about literary borrowings such as sequels and fanworks, which have both complementary and substitutive effects. For an elegant meditation on the limits of the romantic view of copying implicit in the fair use doctrine, see Rebecca Tushnet, “Copy This Essay.”

¹⁵ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 251-52 (1903).

¹⁶ Boyle, *Shamans, Software, and Spleens*; Chon, “Postmodern ‘Progress’”; Coombe, *The Cultural Life of Intellectual Properties*; Elkin-Koren, “Cyberlaw and Social Change”; Jaszi, “On the Author Effect”; Lange, “At Play in the Fields of the Word”; Woodmansee, “On the Author Effect.” On the non-neutrality of copyright’s categories, see, for example, Arewa, “From J. C. Bach to Hip Hop”; Barron, “Copyright Law’s Musical Work”; Barron, “The Legal Properties of Film”; Chon, “New Wine Bursting from Old Bottles.”

¹⁷ See, for example, Ginsburg, “Authors and Users in Copyright,” 7-8.

¹⁸ Lange, “Recognizing the Public Domain”; Litman, “The Public Domain”; Madison, “A Pattern-Oriented Approach to Fair Use.”

¹⁹ See, for example, Lemley, “Romantic Authorship and the Rhetoric of Property,” 878n35.

²⁰ Hayles, *How We Became Post-Human*, 12-13.

²¹ This formulation originated in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

²² For examples, see *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 35-37 (1st Cir. 2001) (applying the merger doctrine); *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996) (applying the *scenes a faire* doctrine).

²³ For examples, see *Boisson v. Baniyan, Ltd.*, 273 F.3d 262, 271-76 (2d Cir. 2001) (finding infringing similarity between two alphabet quilts because of similarity in “total concept and feel”); *Satava v. Lowry*, 323 F.3d 805, 810–12 (9th Cir. 2003) (declining to find infringing similarity between two glass jellyfish sculptures because only ideas and standard features were copied), *cert. denied*, 540 U.S. 983 (2003); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (declining to find infringing similarity between two jeweled bee pins because the idea of a jeweled bee pin merged with its expression).

²⁴ For examples, see *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693, 708 (2d Cir. 1992) (“[T]he more efficient a set of modules are, the more closely they approximate the idea or process embodied in that particular aspect of the program’s structure.”); *Lotus Development Corp. v. Borland International, Inc.*, 799 F. Supp. 203, 217-19 (D. Mass. 1992) (holding that the particular arrangement of commands in spreadsheet menu was an expression of the idea of a spreadsheet menu), *reversed*, 49 F.3d 807, 816-17 (1st Cir. 1995) (holding that the arrangement of commands in the spreadsheet menu was analogous to a “method for operating a VCR” and that

“‘methods of operation’ are not limited to mere abstractions”); *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1373 (10th Cir. 1997) (criticizing *Lotus* on the ground that copyright “does not extinguish the protection accorded a particular expression of an idea merely because that expression is embodied in a method of operation at a higher level of abstraction”), *American Dental Association v. Delta Dental Plans Association*, 126 F.3d 977, 979 (7th Cir. 1997) (holding that the arrangement of items in taxonomy of dental procedures was copyrightable expression because it expressed particular judgments about classification).

²⁵ On the Lockean approach, see Gordon, “A Property Right in Self-Expression,” 1581-81, 1568-72. On freedom of expression and ideas, see Netanel, “Copyright and a Democratic Civil Society,” 347-64. For a representative discussion of the economic approach, see Landes & Posner, *The Economic Structure of Intellectual Property Law*, 90-97.

²⁶ See, for example, Burkholder, “The Uses of Existing Music”; Clayton & Rothstein, eds., *Influence and Intertextuality in Literary History*; Hermeren, *Influence in Art and Literature*; Orr, *Intertextuality*; Pasco, *Allusion*.

²⁷ For examples, see *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2d Cir.1998) (holding that a trivia guide to the *Seinfeld* television show infringed the show’s copyright); *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. 1287, 1293 (C.D. Cal. 1995) (holding that a daredevil character in a Honda commercial infringed the copyright in “the James Bond character as expressed and delineated in Plaintiff’s sixteen films”).

²⁸ See *Thomson v. Larsen*, 147 F.3d 195 (2d Cir. 1998).

²⁹ See *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002), *affirmed on other grounds*, 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S.1114 (2005).

³⁰ See Benkler, “Through the Looking Glass”; Benkler, “Free as the Air to Common Use”; Boyle, “Second Enclosure Movement”; Lange, “Recognizing the Public Domain”; Litman, “The Public Domain”; Lessig, *The Future of Ideas*; Samuelson, “Mapping the Digital Public Domain.”

³¹ See, for example, Landes & Posner, *The Economic Structure of Intellectual Property Law*; Landes & Posner, “Indefinitely Renewable Copyright.”

³² See Liu, “Copyright and Breathing Space”; Pessach, “[Networked] Memory Institutions,” 90. For court decisions characterizing copyright as requiring “breathing space” or “breathing room” for subsequent creators, fair users, and innovators, see *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 933 (2005); *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994); *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1119 (D. Nev. 2006); *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1226 (S.D.N.Y. 1996), *affirmed*, 137 F.3d 109 (2d Cir. 1998).