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**PARCHMENT, PIXELS, & PERSONHOOD:
USER RIGHTS AND THE IP (IDENTITY
POLITICS) OF IP (INTELLECTUAL
PROPERTY)**

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This Article challenges copyright's prevailing narrative on personhood, which has typically focused on the identity interests that authors enjoy in their creative output. Instead, the analysis explores the personhood interests that consumers possess in copyrighted works. Drawing on a wide range of examples—from flag burning as copyright infringement, the "Kookaburra" controversy, and the crowd-sourced origins of the Serenity Prayer to the reported innumeracy of the enigmatic Pirahā Amazonians, the apocryphal source of ancient Alexandria's Royal Library and the unusually fragile nature of digital media—the Article advances a Hegelian refutation to intellectual property maximalism and a theory of copyright that recognizes the crucial link between identity politics and the legal regime governing the monopolization and control of cultural symbols and creative works.

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INTRODUCTION

This song doesn't really belong to us anymore; it belongs to everybody who has ever gotten solace from it.

—Peter Buck of R.E.M.¹

As philosopher Ludwig Wittgenstein once posited, “the limits of my language mean the limits of my world.”² Copyright law circumscribes our linguistic and artistic palettes by subjecting entire wings of Jorge Luis Borges’ metaphoric *Library of Babel*³ to monopolization and by restricting the reproduction and manipulation of cultural content. This Article highlights the critical role that copyrighted works play in personal development by tracing how our relationship with intellectual property impacts both the formation and expression of our identities. In the process, the analysis critiques the insufficient weight traditionally given to the personhood interests of copyright consumers and assesses the growing threat to these interests posed by both technical and legal changes.

As Joseph Liu has argued, while copyright law has a well-developed theory of the author, it lacks a coherent theory of the consumer.⁴ To date, copyright law has typically viewed the

1. R.E.M., IN TIME: THE BEST OF R.E.M. (Warner Bros. 2003) (liner notes for *Everybody Hurts*).

2. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS § 5.6, at 149 (C.K. Ogden trans., 1922) (emphasis in original omitted).

3. JORGE LUIS BORGES, *The Library of Babel*, in FICCIONES 79 (Anthony Kerrigan ed., Grove Press 1962) (1956). In his celebrated short story, *The Library of Babel*, Borges imagines an endless library with books containing every possible ordering of letters, spaces, and punctuation marks. *Id.* Although most of the books in the library are apparent nonsense, volumes within the library contain, among other things:

the minute history of the future, the autobiographies of the archangels, the faithful catalogue of the Library, thousands and thousands of false catalogues, a demonstration of the fallacy of these catalogues, a demonstration of the fallacy of the true catalogue, the Gnostic gospel of Basilides, the commentary on this gospel, the commentary on the commentary of this gospel, the veridical account of your death, a version of each book in all languages, the interpolations of every book in all books.

Id. at 83.

4. See Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C. L. REV. 397, 398–99 (2003) (footnote omitted) (“[D]espite [the] recognition of a general consumer interest, rather little has been written about the precise shape and scope of this interest. The Copyright Act itself scarcely mentions consumers—indeed, it contains no consistent generic term to refer to those who consume copyrighted works—and the literature has generally followed suit.”); see also Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intel-*

consumer⁵ either as a passive receiver of copyrighted content or an active creator of new content from old.⁶ However, in recent years, scholarship has begun to move beyond this narrow binary. Liu, for example, has challenged this bifurcation by emphasizing the important interests that consumers possess in the use of copyrighted works for advancement of autonomy (e.g., customizing the order in which you may play a CD or which scenes you might view in a movie),⁷ communication (e.g., being able to talk about the latest episode of *The Office* or the newest *Harry Potter* movie at the water cooler),⁸ and self-expression (e.g., engaging in such acts of “mini-authorship” as creating a mix tape).⁹ Meanwhile, Rebecca Tushnet has asserted that the right to engage in non-transformative copying is an important part of vindicating First Amendment values.¹⁰

lectual Property, 68 CHI.-KENT L. REV. 841, 845 (1993) (noting that copyright scholarship has focused on the author at the expense of giving insight into the “intensity or significance of *individual* costs” for users whose rights to cultural content might be limited by copyright protections).

5. By “consumer” or “user,” I refer to anyone who makes use of copyrighted content, not simply those who purchase copyrighted material or receive authorized access. As Joseph Liu observes, the word “consumer” is particularly apropos, as it emphasizes a focus on uses of copyrighted works that are literally consumptive, and not necessarily productive, in nature. See Liu, *supra* note 4, at 400 (“[C]opyright law and commentary contain no universally accepted generic term for those who access, purchase, and use—i.e., ‘consume’—copyrighted works. I am consciously choosing the term ‘consumer,’ rather than a more neutral term like ‘user,’ ‘the public,’ or ‘audience,’ in part because I wish to focus on those uses that are literally consumptive rather than productive in nature, and the term roughly captures this distinction.” (footnotes omitted)).

6. *Id.* at 399. As Joseph Liu argues, copyright doctrine seeks to “ensur[e] that conditions exist for a functioning market in copyrighted works,” by forbidding, *inter alia*, unauthorized reproduction of protected works and creating economic incentives for the distribution of such works. In the process, therefore, it implicitly supports a theory of passive consumption by simply ensuring that copyrighted works, much like potato chips, athletic shoes, and bottled water, are supplied to users like any other consumer good. *Id.* at 402–04. At the same time, copyright doctrine also recognizes the fact that new creative works can often come from the use/consumption of old works. As such, copyright makes room for such efforts through features such as the idea/expression dichotomy, the fair use doctrine (especially its protection for transformative uses), and the limited term of protection. *Id.* at 405–06.

7. *Id.* at 406–07.

8. *Id.* at 411.

9. *Id.* at 415.

10. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 545–46 (2004). Among other things, the First Amendment’s guarantees of freedom of speech and of the press do more than simply protect the rights of speakers; they also ensure that individuals have access to diverse speech. See *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 663 (1994) (finding that “assuring that the public has access to a

The ability (or inability) to copy can affect the right of individuals to participate in our culture and the body politic;¹¹ it can regulate access to certain forms of knowledge;¹² and it can impact the ability to ground one's expressive activities in a particular cultural context or meaning.¹³ As the scholarship of Tushnet and Liu makes clear, it would be a mistake to fetishize transformative use while failing to recognize the social benefits of non-critical copying of creative works. Nevertheless, traditional copyright theory has long underappreciated the role that intellectual property possession, use, and consumption—even of the non-transformative variety—play in mediating personal development and advancing identity interests.

This Article takes a modest step toward identifying these personhood interests, examining the way in which the law has failed to account fully for these interests, and providing a theoretical framework for the future consideration of these interests. Greater awareness of the personhood interests at stake for users, rather than just creators, of copyrighted content can provide a valuable basis to question the unfettered expansion of intellectual property protections. In so arguing, the Article focuses most closely on copyright law, as its subject matter most frequently implicates the control of cultural content relevant to identity formation. However, the Article also touches on trademark and other related intellectual property doctrines.

The importance of fully accounting for consumer interests is especially warranted at this juncture given the growing complexity of the relationship between intellectual property and consumers. First, intellectual property has become increasing-

multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment”).

11. See Tushnet, *supra* note 10, at 545–46 (“If *The Sopranos* or *Queer as Folk* have a significant impact on our culture, then access to those programs improves a person’s ability to participate in making and interpreting that culture. There could be a problem for democracy when copyright owners set prices so high that some people can’t read or watch what many others do.”).

12. *Id.* at 565 (noting that “[c]opying promotes democracy by literally putting information in citizens’ hands” (citing David Owen, *Power to the People: The Photocopier*, L.A. TIMES, Aug. 10, 2004, at B13)).

13. For example, Tushnet points out that the implementation of music into a home video can help to explain how one feels and what one values, Tushnet, *supra* note 10, at 568, and that “most Americans can probably recall some song, book, or movie that seemed so perfectly expressive of their own lives that they identified completely with it and would even explain themselves to others by reference to that work.” *Id.* at 569.

ly decoupled from its physical moorings.¹⁴ Second, mass-consumption of intellectual property has increased.¹⁵ Finally, and most importantly, technology has provided consumers with greater means of manipulating intellectual property and of customizing one's experiences with it.¹⁶ These three conditions, in turn, have precipitated new identity-formation mechanisms, many of which are mediated—for better or worse—by intellectual property rights. After all, both the meaning and value of intellectual property occurs at the interface of production and consumption.

Part I begins by examining the place of the user in the intellectual underpinnings of our copyright regime. To do so, I conduct an exegesis of the jurisprudence on copyright term extensions and, in the process, identify the utilitarian, labor-desert, and personhood theories at play in copyright policy. These theories of copyright protection have traditionally focused on the repercussions of intellectual property rules on creators while eschewing almost any analysis of the law's impact on its other significant subject: consumers. Seeking to remedy this critical oversight, I scrutinize the increasing use of personhood interests to call for expanded protection of authorial rights in copyrighted works and I propose, instead, a Hegelian refutation of intellectual property maximalism.

Towards this end, Part II examines how personhood interests develop through the interaction of individual users with property. I first discuss the role of consumption and customization of tangible goods in the development and actualization of personal identities—specifically, through the *formation* and *expression* of identity interests. I then assess the analogous process with the consumption and customization of intangible property and observe how the structure of our intellectual property laws regulate such interaction with cultural content. Thus, while a purchased pair of jeans can be ripped, dyed, bleached, acid-washed, or disfigured, the equivalent piece of intellectual property cannot be altered without violating the law.

14. See John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45, 52 (2003) (noting how digital technology is creating an even more pronounced distinction between physical and intellectual property).

15. For example, one need look no further than the considerable increase in the purchases of smartphones, which allow consumers ubiquitous access to intellectual property. See Lance Whitney, *Cell Phone, Smartphone Sales Surge*, CNET (May 19, 2010, 10:01 AM), http://news.cnet.com/8301-1035_3-20005359-94.html.

16. Liu, *supra* note 4, at 409.

The implications of this regime are significant; intellectual property laws can and do control access to some of our most important symbolic signifiers. They therefore regulate the semiotic devices¹⁷ fostering cultural reproduction and patrol the relationship between individuals and society. Four case studies illustrate this process by examining the impact of several specific doctrinal features of our intellectual property regime: the treatment of government works under copyright law; the notion of “authorship” that undergirds the copyright monopoly; the growing adoption of *sui generis* intellectual property rights beyond traditional boundaries; and the expanding duration of copyright protection. These case studies demonstrate how our intellectual property laws enable putative rights holders to control individual use and invocation of national and international symbols, spiritual homilies, cultural heritage, and even basic language. Thus, specific features of our intellectual property regime regulate relationships between insiders and outsiders, mediate the development of cultural networks, and demarcate social strata. In short, they play a critical and underappreciated role in the formation and expression of identity.

Of course, features of our intellectual property regime do provide some implicit—if not explicit—protection for the personhood interests of users. Along with certain statutory exemptions from infringement and the application of the fair use doctrine, one of the most significant sources of protection stems from the large measure of immunization that the unauthorized possession and private use of copyrighted works have historically enjoyed. In this way, the law has supported the rights of users to obtain access to cultural content—a vital predicate for the vindication of identity interests. But, as detailed in Part III, technological and legal developments are posing a radical threat to the right to private use and possession of both authorized and unauthorized copies of copyrighted works. Specifically, the expansion of secondary liability theories, the nature of digital distribution, the enforcement of the anti-circumvention provisions of the Digital Millennium Copyright Act, and fundamental policy changes being considered as part of the multilateral Anti-Counterfeiting Trade Agreement have allowed government and putative rights holders to invade the private

17. Here, I use the term “semiotic devices” to refer to a signaling device that conveys and expresses information about aspects of an individual’s identity.

sphere to regulate such previously protected activities as the sharing of family photo albums, the use of photocopied scholarly articles by students, and the enjoyment and study of motion pictures by cinephiles. In the process, we are squelching personal development and identity formation in contexts traditionally invisible to the gaze of the law.

Thus, it is not simply traditional features of copyright—rationalized through theories of utilitarianism, labor-desert, and personhood that have typically focused on the relationship between copyright law and the author—that have given short-shrift to user identity interests. Rather, technological and legal changes are undermining the access and use rights that consumers of copyrighted works have long enjoyed. Greater and more explicit consideration and protection of these consumer interests are therefore warranted in the copyright calculus since, in the twenty-first century, control of IP (intellectual property) has become essential to the control of IP (identity politics).

I. LOCATING USERS IN THE COPYRIGHT SKEIN

To understand the place of the consumer in modern copyright jurisprudence, we must first examine the theoretical underpinnings of our copyright regime. I begin by identifying three dominant conceptions of copyright: utilitarian, labor-desert, and personhood. I then exemplify the application of these concepts in the debate over copyright term extensions. In the course of the analysis, I identify how user interests—especially the complex and personal relationship consumers enjoy with copyrighted subject matter—have received insufficient consideration in the law.

A. *Utilitarian, Labor-Desert, and Personhood Justifications for Copyright*

The historical battle over copyright protection pitted adherents of two different theoretical frameworks against one another: utilitarianism and natural law.¹⁸ The utilitarians emphasized copyright's role in providing individuals with the necessary economic incentives to encourage the production and

18. See generally John Tehranian, *Et Tu, Fair Use? The Triumph of Natural Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005) (documenting the struggle between natural law and utilitarian conceptions of copyright law through the years).

dissemination of creative works. Generally speaking, utilitarians reluctantly tolerated the monopolistic nature of copyright to the extent that it served the goal of promoting progress in the arts, and no further.¹⁹ The utilitarians found the best expression for their vision of copyright in the instrumentalist language of the Copyright Clause of the Constitution, and the original system of copyright established by the Founding Fathers with the Copyright Act of 1790.²⁰

However, over the past century and a half, utilitarianism has gradually given way to a natural law vision of copyright, heavily influenced by the theories of John Locke²¹ and William Blackstone.²² Born less of welfare-maximization than labor-desert factors, this vision is grounded in the inherent rights of authors to the fruits of their labor and the Lockean premise that every man has a property right in his body, and that, therefore, “[t]he labor of his body and the work of his hands . . . are properly his.”²³ Since intellectual property is the labor of the mind, the labor-desert theory seeks to protect the natural

19. See, e.g., Thomas Jefferson, Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in *THE WRITINGS OF THOMAS JEFFERSON* 326, 333–34 (Albert Ellery Bergh ed., 1907) (“If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone He who receives an idea from me, receives instruction himself without lessening mine That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man . . . seems to have been peculiarly and benevolently designed by nature”); James Madison, Detached Memoranda, in *JAMES MADISON: WRITINGS* 745, 756 (Jack N. Rakove ed., 1999) (“The Constitution of the U.S. has limited [monopolies] to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use. There can be no just objection to a temporary monopoly in these cases: but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given.”).

20. U.S. CONST. art I, § 8, cl. 8 (granting, with explanation, Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); see also Copyright Act of 1790, ch. 15, 1 Stat. 124, 124 (1790) (repealed 1831) (“An Act for the encouragement of learning”).

21. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* paras. 25–51, at 16–30 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690). For a further examination of competing theories of property, including those of John Locke, and their influence on legal thought, see Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

22. See 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 1 (1766).

23. LOCKE, *supra* note 21, para. 27, at 17.

law right of authors to exert absolute Blackstonian dominion over creative works.²⁴ This theory of copyright has played a profound role in shaping the development of our modern copyright regime, sometimes to the detriment of utilitarian concerns.

At the same time, a different type of natural law theory—one based less on labor-desert than on the inherent personhood interests that artists possess in their works—has grown increasingly influential in recent years. Built on Hegelian insights²⁵ and epitomized by the work of Margaret Jane Radin,²⁶ the personhood framework focuses on the relationship between objects and identity interests. Starting with the premise that “human individuality is inseparable from object relations of some kind,”²⁷ personhood theory promotes the strongest property rights where individuals have interwoven their identity with a good, almost metaphysically imbuing it with a part of themselves. While the Lockean theory of natural-law copyright emphasizes the need for strong property rights in creative works based on the intellectual labor put into those works, ad-

24. To Blackstone, natural law gives authors the right to deny any unauthorized use of their literal words and even styles and sentiments. An author “has clearly a right to dispose of [his work] as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right to property.” See 2 BLACKSTONE, *supra* note 22, at 405–06; see also Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 783 (2000) (arguing that a Blackstonian vision of copyright embraces the author’s “sole and despotic dominion” over a given work, a right of “total exclusion” asserted in perpetuity against any attempt to imitate the sentiments, vary the disposition, or derive any social or economic value from a work.” (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 400, 405 (1766))).

25. See Radin, *supra* note 21, at 977–78 (noting that Hegel’s various insights—“the notion that the will is embodied in things”; the idea that freedom, in the form of rational self-determination, is “only possible in the context of a group (the properly organized and fully developed state)”; and the view of “objective community morality in the intuition that certain kinds of property relationships can be presumed to bear close bonds to personhood”—provide a strong case in favor of property for personhood).

26. See *id.* at 960–61 (“Once we admit that a person can be bound up with an external ‘thing’ in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that ‘thing.’ . . . [T]here is such a thing as property for personhood because people become bound up with ‘things.’”). It is important to note that Radin’s influential work did not embrace wholesale propertization without reservations. While she urged strong property rights for certain items bound in personhood, she cautioned that “[s]ome objects may approach the fungible end of the continuum so that the justification for protecting them as specially related to persons disappears.” *Id.* at 1005.

27. *Id.* at 972.

herents to the personhood theory believe in protecting authorial property rights on the grounds that the creative works of artists are an indissoluble and inseparable part of their soul, spirit, and vision. Over the years, this view has found its greatest expression in the laws of several European countries, where so-called “moral rights” have protected, among other things, the rights of attribution and integrity.²⁸ Under this theory, artists possess an inalienable right to be associated (or not associated) with their artwork, in accordance with their wishes. Further, creators possess the inalienable right to preserve the integrity of their works. As a result, owners of the physical piece of art cannot compromise the vision of the original artist through the unauthorized modification or mutilation of the work in question.²⁹

B. *Copyright Theory and the Debate over Term Extensions*

One can identify the presence of all three theoretical strands—utilitarian, labor-desert, and personhood—in leading debates over copyright doctrine. Consider, for example, the controversy over copyright term extensions. In *Eldred v. Ashcroft*,³⁰ the Supreme Court heard and rejected a constitutional

28. See Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67 (2007) (arguing that it “has long been a basic tenet of comparative copyright theory that American and European copyright systems differ primarily in their attitudes towards the protection of moral rights of authors . . . [W]hile the exclusive rights contained in the U.S. Copyright Act were limited to ‘economic’ rights . . . the copyright statutes of France, Germany, and Italy also included ‘moral’ rights designed to protect the non-economic interests of authors in their works”).

29. See Berne Convention for the Protection of Literary and Artistic Works, art. 6bis(1), Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (“Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”).

30. 537 U.S. 186 (2003). In the suit, Eric Eldred, an internet publisher, challenged the constitutionality of the Sonny Bono Copyright Term Extension Act (“CTEA”), which had extended all subsisting copyrights by an additional twenty years. Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The CTEA prevented a number of works scheduled to lose their copyright protection from entering the public domain between 1998 and 2018. Chris Sprigman, *The Mouse That Ate the Public Domain, the Copyright Term Extension Act, and Eldred v. Ashcroft*, FINDLAW, Mar. 5, 2002, http://writ.news.findlaw.com/commentary/20020305_sprigman.html. Eldred and the other plaintiffs relied upon the entry of works into the public domain for their activities. *Eldred*, 537 U.S. at 193. Eldred, for example, owned Eldritch Press, a website where he would make public domain works available to the public without cost. Sprigman, *supra*.

challenge to Congress's ability to extend all subsisting copyrights by a term of twenty years through the Sonny Bono Copyright Term Extension Act of 1998 ("CTEA").³¹ The different opinions issued by the Justices capture the various theoretical undercurrents at play.

The majority opinion, crafted by Justice Ginsburg, draws upon labor-desert theory to reject the constitutional challenge.³² In the appeal, the plaintiff, Eldred, argued that the CTEA violated the First Amendment because, among other things, it constituted a regulation of speech properly subject to heightened judicial scrutiny—scrutiny it could not withstand.³³ Following its lower court predecessors, the Supreme Court squarely rejected this proposition.³⁴ In a key passage from the majority decision, Justice Ginsburg posits that "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make *other people's speeches*."³⁵ With these words, Ginsburg denotes a bright line between the constitutionally guaranteed right to make our "own speech," and the far more attenuated ability to use "other people's speeches." The notion that one can separate speech into these two categories is readily in accord with a labor-desert vision of copyright, which implicitly recognizes this bifurcation. After all, proponents of labor-desert theory assume that creative works emerge from an author's independent genius and are, therefore, rightfully granted strong copyright protection. In so doing, however, they either overlook or downplay the fact that many (if not all) creators borrow from the public domain or pre-existing works, and inevitably stand on the shoulders of giants.³⁶ Thus, Ginsburg relies upon a facile and problematic differentiation between one's own speech and the speech of others. She assumes that authors create *ex nihilo*, drawing solely upon their own labors—and not the previous efforts of others—to produce their copyrighted works. In the view of the majori-

31. 17 U.S.C. §§ 302(a), (c), 304 (2006).

32. *Eldred*, 537 U.S. at 192.

33. *Id.* at 194.

34. *Id.* at 218–19.

35. *Id.* at 221 (emphasis added).

36. For example, George Harrison, whom Beatles fans would surely defend as a creator of the first order, was famously and successfully found liable for subconscious infringement when he purportedly usurped key elements from The Chiffons' 1963 hit "He's So Fine" in composing his song "My Sweet Lord." See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976).

ty, therefore, authors are properly entitled to the fruits of their creative endeavors because those efforts are the product of their minds, and theirs alone.

In stark contrast, Justice Breyer's dissenting opinion in *Eldred* draws upon the utilitarian theory of copyright, which ultimately leads him to a very different conclusion.³⁷ To Breyer, the central query regarding the constitutionality of the CTEA is whether it meaningfully incentivizes increased creation and dissemination of copyrighted works. "[M]ost importantly," he writes, the CTEA's "practical effect is not to promote, but to inhibit, the progress of 'Science'—by which word the Framers meant learning or knowledge,"³⁸ a factor glossed over in Ginsburg's analysis. While Ginsburg focuses on the right of individuals to the just fruits of their labor, Breyer focuses on the ability of copyright law to confer public benefits by advancing learning and the dissemination of knowledge.³⁹ Breyer argues that, at best, the CTEA only fractionally increases the average author's incentive to create.⁴⁰ Moreover, it stifles the interests of "historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds—those who want to make the past accessible for their own use or for that of others."⁴¹ Overall, the CTEA imposes a high cost on the public by impeding the propagation of vast tracts of knowledge while providing little benefit to the public in the way of incentivizing the creation of new works. Thus, on utilitarian grounds, Breyer finds the CTEA constitutionally infirm.

Similarly, in *Eldred*'s other dissenting opinion, Justice Stevens questions the validity of the CTEA by drawing upon a utilitarian vision of intellectual property rights.⁴² As he writes:

37. *Eldred*, 537 U.S. at 242–43 (Breyer, J., dissenting).

38. *Id.* at 243.

39. *Id.* at 244.

40. *See id.* at 267 ("[I]f an author expects to live 30 years after writing a book, the copyright extension (by increasing the copyright term from 'life of the author plus 50 years' to 'life of the author plus 70 years') increases the author's expected income from that book—i.e., the economic incentive to write—by no more than about 0.33%."); *see also id.* at 254–55 ("Using assumptions about the time value of money provided us by a group of economists (including five Nobel prize winners), it seems fair to say that, for example, a 1% likelihood of earning \$100 annually for 20 years, starting *75 years into the future*, is worth less than seven cents today What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum? What monetarily motivated Melville would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account?" (internal citations omitted)).

41. *Id.* at 250.

42. *Id.* at 222–23 (Stevens, J., dissenting).

Neither the purpose of encouraging new inventions nor the overriding interest in advancing progress by adding knowledge to the public domain is served by retroactively increasing the inventor's compensation for a completed invention and frustrating the legitimate expectations of members of the public who want to make use of it in a free market We have recognized that these twin purposes of encouraging new works and adding to the public domain apply to copyrights as well as patents.⁴³

To Stevens, the copyright calculus should eschew any singular desire to reward a creator's labor simply on the grounds of just desert.

Finally, strains of the personhood theory have also permeated the debate on copyright duration. Advocates of personhood interests ask whether a copyrighted work constitutes an extension of an author's own identity and, therefore, the extent to which control of the work is tantamount to control over one's own person.⁴⁴ This personhood trope is perhaps epitomized by the changing contours of copyright terms. Prior to 1976, copyright duration was both finite and fixed, governed by absolute terms. Between the first Copyright Act in 1790 and the most recent revisions in 1976, the maximum copyright duration (i.e., the original term plus the renewable term) gradually expanded from twenty-eight to forty-two years, and then to fifty-six years.⁴⁵ Since 1976, however, copyright terms have been pegged to an exogenous variable lifetime: the lifetime of the author plus fifty years under the 1976 Act, and the lifetime of the

43. *Id.* at 226–27.

44. *See, e.g.*, Radin, *supra* note 21, at 1015 (noting that the case is strongest for recognizing personhood interests in property “where without the claimed protection of property as personal, the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.”); Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.’s New Performances Regulations*, 24 B.U. INT’L L.J. 213, 217–218 (2006) (noting that moral rights are premised on the protection of an artist’s personhood interests and the idea that “the artistic person cannot ever be separated fully or distinctly from her creative works”).

45. *Eldred*, 537 U.S. at 194–96 (detailing the history of copyright terms under federal law). Admittedly, however, extension terms were dependent on the author’s survival at the time of renewal eligibility. *Id.* at 201 n.6. For example, under the 1790 Copyright Act, a copyright lasted fourteen years and could be extended for another fourteen years if, and only if, the author both survived and applied for a renewal term. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

author plus seventy years with the passage of the CTEA.⁴⁶ The underlying concept is simple: there is a link between the author's life, or physical existence, and the property right that the author possesses in her creative output. Under the modern "lifetime-plus" framework, copyright protection is inextricably tied to an author's mortality. The duration of the author's life therefore determines the duration of the author's intellectual property rights.

Perhaps above all, personhood interests have played an especially strong role in guiding the public discourse over copyright. In particular, rights holders and authors have appealed to such interests to rationalize the expansion and strengthening of protection and enforcement mechanisms by drawing upon a romantic vision of authorship. Under this heuristic, authors are conceptualized as solitary geniuses whose mythic individual efforts result in the creation of original works *ex nihilo*—works that contain essential parts of the artist's being.⁴⁷ In recent years, this notion has fueled the expansion of moral rights in the United States through the broader reading of such existing laws as the Lanham Act,⁴⁸ and with the enactment of

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

47. JAMES BOYLE, SHAMANS, SOFTWARE, & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51–60 (1996); James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 629 (1988); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 455–63 (1991).

48. See 15 U.S.C. § 1125(a) (2006) (prohibiting false designations of origin and false advertising likely to cause consumer confusion). The Lanham Act's prohibitions against false designations of origin and false advertising have been read to include moral rights-style claims against mutilation and false attribution. See, e.g., *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976) (holding that the unauthorized bowdlerization of several *Monty Python* episodes by ABC could give rise to a cognizable legal claim against the broadcaster under the Lanham Act). As the *Gilliam* Court reasoned:

American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law or the tort of unfair competition. Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form.

such new statutory protections as the Visual Artists Rights Act.⁴⁹ In recognizing these authorial identity interests, legislators and courts have legitimated copyright protectionism by elevating the mental labors of the author to “a privileged category of human enterprise.”⁵⁰ In testimony before Congress and in advertisements pleading with the public not to engage in piracy, the face of copyright—the sympathetic artist or creator—breeds the perception among consumers that copyright infringement is a personally violative act—a veritable usurpation and mutilation of the author’s identity.⁵¹

C. *Considering User Interests and Rights*

As the debate surrounding copyright term extensions reveals, intellectual property minimalists have typically seized upon the utilitarian theory to resist expansions in protection. As Jamie Boyle has noted:

Minimalists are used to fighting [sic] off covert sweat of the brow claims, concealed appeals to natural right, and Hegelian notions of personality made manifest in expression—all deployed to argue that rightsholders should have their legally protected interests expanded yet again. Against these rhetorics, they insist on both constitutional and economic grounds that the reason to extend intellectual property rights can only be the promotion of innovation.⁵²

Meanwhile, intellectual property maximalists have seized upon labor-desert and personhood theories to advocate greater protections. For example, Madhavi Sunder has observed a profound transformation in the underlying discourse legitimating

Id. at 24 (internal citations omitted).

49. See Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2006) (granting rights of integrity and attribution for certain works of visual art).

50. Jaszi, *supra* note 47, at 455.

51. A sympathetic appeal to the fundamental personhood interests that artists have in the products of their intellectual creation has often been raised when artists and writers—Mark Twain and Charles Dickens in bygone eras, Don Henley and Sheryl Crow in recent years—have famously appeared before Congress or directly lobbied the public for statutory reform. See, e.g., *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Judiciary Comm.*, 104th Cong. 56 (1995) (statement of Don Henley) (“I cut, shape, refine, and position each word and each note until I have crafted a song that I believe is true. My songs are an expression of *who I am and what I stand for*, and the laws which govern the results of my endeavors demand that people respect my work.”) (emphasis added).

52. James Boyle, *Enclosing the Genome: What the Squabbles over Genetic Patents Could Teach Us*, 50 *ADVANCES IN GENETICS* 97, 119 (2003).

intellectual property protections: whereas they were once rationalized as incentivizing production by providing exclusive control over intellectual creations, intellectual property rights are increasingly viewed as necessary to protect the identity interests of property owners.⁵³ Indeed, it is almost impossible to support most recent intellectual property legislation on incentivization grounds alone.⁵⁴ As a result, the modern intellectual property regime is increasingly tethered to a theoretical framework bent on labor-desert and personhood protection—a framework that has been used to rationalize the increasing scope of intellectual property protections.

However, the debate between minimalists and maximalists is incomplete. The existing polemic, which typically pits labor-desert and personhood interests against utilitarian interests, does not, and should not, fully define the metes and bounds of the policy discourse. Specifically, proponents of all three theories of copyright—utilitarian, labor-desert, and personhood—have typically emphasized the relationship of the intellectual property regime to the creator or owner of the intellectual property. By focusing on the impact of copyright on creators, however, the theories have given short shrift to the critical impact of our legal regime on consumers and users of intellectual property. For example, the utilitarian line typically emphasizes the impact of copyright law on *encouraging creation by artists*;⁵⁵ the labor-desert line focuses on properly *rewarding the independent genius of authors*;⁵⁶ and the personhood line recognizes the degree to which *authors imbue their works with a part of themselves*.⁵⁷ Yet consumers of intellectual property too

53. Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER, RACE & JUST. 69, 71–72 (2000).

54. Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 260 (2006) (noting that “[s]cholars in both economics and law are unable to make economic sense of new [intellectual property] rights”).

55. See, e.g., Pierre N. Laval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990) (“The utilitarian concept underlying the copyright promises authors the opportunity to realize rewards in order to encourage them to create.”).

56. See, e.g., Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW 3, 24 (Fiona Macmillan ed., 2007) (noting the intertwining of labor-desert theory with a romantic notion of the author to rationalize greater protectionism).

57. See, e.g., Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 410 (2009) (discussing moral rights protection as premised on the notion that “artistic creation is not merely a product that can be bought or sold but rather it is a direct reflection on the author’s personality, identity, and even his or her ‘creative soul’”).

have strong, often underappreciated, identity interests in the intellectual property with which they interact.

In so arguing, I add to a nascent body of literature that focuses on developing copyright's theory of the consumer/user. Julie Cohen, who builds on the work of Tushnet and Liu, argues that copyright law would benefit from greater consideration of the "situated user"—a user whose "patterns of consumption and the extent and direction of her own authorship will be shaped and continually reshaped by the artifacts, conventions, and institutions that make up her cultural environment."⁵⁸ To Cohen, the situated user, who is neither a passive consumer nor active transformer of existing copyrighted content,

engages cultural goods and artifacts found within the context of her culture through a variety of activities, ranging from consumption to creative play. The cumulative effect of these activities, and the unexpected cultural juxtapositions and interconnections that they both exploit and produce, yield what the copyright system names, and prizes, as "progress."⁵⁹

Thus, as Cohen posits, consumption of copyrighted works can do as much to advance the ultimate goal of our copyright regime—progress—as the creation of them. In a sense, therefore, Cohen provides a utilitarian justification for a greater emphasis on user rights in order to spark "intellectual and creative progress."⁶⁰ But consideration of "users' rights" does more than simply advance the traditional utilitarian goals of the copyright regime.

In the spirit of Wittgenstein's observation at the outset of this Article, the scope of one's available semiotic palette inextricably impacts the process of self-definition. Trademark, copyright, and even patent laws thereby shape identity development through their regulation, propertization, and monopolization of cultural content. Specifically, the contours of our intellectual property regime privilege certain individuals and groups over others and intricately affect notions of belonging, political and social organization, expressive rights, and semiotic structures. In short, intellectual property laws lie at the heart of what Madhavi Sunder has observed as the "strug-

58. Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 349 (2005).

59. *Id.*

60. *Id.* at 373.

gles over discursive power—the right to create, and control, cultural meanings.”⁶¹

Drawing on the groundbreaking work of Sunder and others,⁶² this Article advances a theory of intellectual property that recognizes the crucial link between identity actualization and the legal regime governing the monopolization and control of cultural symbols and creative works. However, the analysis here differs from some of the prior scholarship in important respects. First, I build on prior scholarship in identifying the interests that users possess in the consumption of intellectual property by casting these interests (and their suppression) against the comparatively wider breadth of rights that putative consumers of tangible property enjoy. In the process, I concentrate my analysis on the identity-based interests at play in the use of copyright content, focusing on both the internal and external components of personhood actualization: the formation and expression of identity. I offer this species of user interests as a countervailing force against the prevailing narrative of personhood, which has typically focused on the identity interests of authors in their creative works. Thus, I evoke the personhood trope as a means not to justify the strengthening of intellectual property rights but, rather, to at least question it.

Second, I eschew a constitutional heuristic, opting to address the concerns I raise within the four corners of copyright doctrine by identifying and focusing on the specific features of our copyright regime—both extant and emerging—that result in the inadequate attention given to user interests in the formation and expression of identity. For example, in urging expanded protection for personal uses of copyrighted works, Rebecca Tushnet focuses on the idea that copies (even unauthorized) can constitute a form of speech that should be protected under the First Amendment.⁶³ Yet for all of its potential and merit, this approach has largely failed in practice as courts have generally rejected independent constitutional

61. Sunder, *supra* note 53, at 70.

62. See, e.g., Cohen, *supra* note 58; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1535–39 (1993); Liu, *supra* note 4; Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 *CORNELL L. REV.* 463 (2010); Tushnet, *supra* note 10.

63. Tushnet, *supra* note 10, at 590 (“We should struggle against the impulse to tell only one story about . . . how copyright interacts with the First Amendment. Sometimes a copy is just a copy; other times it is vitally important speech.”).

scrutiny of copyright on free speech grounds.⁶⁴ Moving beyond the free speech paradigm, Jennifer Rothman has proposed that the Fourteenth Amendment might serve as a vehicle to vindicate the fundamental liberty interests at play in the use of cultural content.⁶⁵ In making this substantive due process argument, she provides a creative mechanism to challenge intellectual property maximalism and gives an alternative constitutional voice to the identity interests of users.⁶⁶ However, a Fourteenth Amendment challenge faces numerous hurdles. Above all, to be subject to a substantive due process analysis, the alleged fundamental liberty at stake must be “objectively, ‘deeply rooted in this Nation’s history and tradition.’”⁶⁷ This is an exacting standard,⁶⁸ even if it has evolved, as Rothman argues, to require only fealty to general principals rather than specific rights.⁶⁹ Given the intense skepticism about the in-

64. Rothman, *supra* note 62, at 478. Interestingly, courts have appeared more receptive to conducting independent constitutional scrutiny of right of publicity claims. See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972 (10th Cir. 1996) (upholding the free speech rights of a trading card company to sell parody baseball cards without the permission of the players featured on the cards, despite a right of publicity claim).

65. Rothman, *supra* note 62, at 478. Rothman “situate[s] certain types of uses of copyrighted works—identity-based uses—in the context of long-standing substantive due process protections for identity and personhood,” *id.* at 475, and argues that limitations of such uses should be subject to heightened scrutiny as they interfere with “liberty” interests protected under the Fourteenth Amendment. *Id.* at 494.

66. *Id.* at 494.

67. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

68. While there may be perfectly good reasons to view copyright-related limitations on our rights of intimate association, cultural, linguistic and religious autonomy, and mental integrity as violations of the Fourteenth Amendment, there is little precedent to prevent courts from dismissing the constitutionalization of these interests with the exact same logic they have used to dispense with First Amendment challenges to copyright. That is, challenges arguing that the Reconstructionists never recognized any incompatibility between the Fourteenth Amendment and copyright, that the two doctrines have co-existed happily for almost a sesquicentennial, and that while you have a right to make your own identity, one does not attain the right to free-ride on the identity or identity interests of others. See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (rejecting a First Amendment challenge to copyright term extensions by finding that, while you have the right to make your own speech under the First Amendment, you do not necessarily have a constitutional right to make the speech of others).

69. Rothman, *supra* note 62, at 504. Rothman argues that “the Supreme Court in *Lawrence v. Texas* rejected the narrowly articulated test from *Washington v. Glucksberg* that restricted substantive due process rights only to those that are specifically rooted in history and tradition. *Lawrence* made clear that the historical and traditional grounding of the *specific* right, e.g., homosexual sodomy, is less important than the theoretical grounding of those specific rights in the broad-

creasing reliance on substantive due process to constitutionalize the protection of certain liberties,⁷⁰ it is entirely possible (and even likely) that the judiciary would reject arguments that user rights to copyrighted property are deeply rooted in our country's history and tradition, and involve fundamental liberty interests on the same grand scale as choices involving abortion,⁷¹ contraception,⁷² sexual conduct,⁷³ medical treatment,⁷⁴ child rearing,⁷⁵ and marriage.⁷⁶ Thus, while there may be no danger that substantive due process will be eliminated entirely any time soon,⁷⁷ there is strong reason to believe the doctrine will not enjoy such a dramatic expansion as to include the identity interests of users of copyrighted material.

Instead, building on the work of Liu and Cohen, I focus on the internal workings of copyright doctrine and the interface of technology with these mechanisms. Cohen generally advocates that scholars and policy makers give greater consideration to the user interests she identifies—consumption, communication, self-development, and creative play.⁷⁸ Liu urges responses by both legislators and the market, adding that the fair use doctrine could also play a key role in vindicating the user interests he identifies—autonomy, communication, and self-expression.⁷⁹ I emphasize the resistance needed to stem the radical changes afoot in copyright doctrine that threaten to undermine the historical protection that users have enjoyed in the possession and private use of copyrighted works—rights critical to the identity interests I have highlighted. Moreover, I document how extant

er context of historically embraced *principles* such as intimate association or personal autonomy." *Id.*

70. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 756 (Souter, J., concurring) (acknowledging the "skepticism of those who find the Due Process Clause an unduly vague or oxymoronic warrant for judicial review of state substantive law"); ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 31, 118–19 (1996) (decrying substantive due process as a "momentous sham" that constitutes undemocratic legislating from the bench); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 14–21 (1980) (challenging the legitimacy of substantive due process on the grounds that, *inter alia*, the very concept is an inherent contradiction in terms, much like "green pastel redness").

71. *Roe v. Wade*, 410 U.S. 113 (1973).

72. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

73. *Lawrence v. Texas*, 539 U.S. 558 (2003).

74. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

75. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

76. *Loving v. Virginia*, 388 U.S. 1 (1967).

77. See Rothman, *supra* note 62, at 503 ("[S]ubstantive due process exists, is well established, and is in no danger of being eliminated.").

78. Cohen, *supra* note 58, at 374.

79. Liu, *supra* note 4, at 427–28.

features of the copyright regime—from the expanding duration of copyright terms and the authorial conception underlying copyright protection to the growing scope of quasi-trademark rights and the surprisingly narrow dedication of government works to the public domain—can impinge upon these interests.

II. A THEORY OF CONSUMPTION AND COMMUNICATION:
COMPARING THE TREATMENT OF IDENTITY INTERESTS FOR
TANGIBLE AND INTELLECTUAL PROPERTY

A. *Property Rights and Personhood*

Our analysis begins by considering the interplay between property rights and personhood, and the way in which intellectual property rules control and even restrict such relationships, often with underappreciated socio-structural consequences. In a modern capitalist society, consumption—both private and conspicuous—represents an instrumental component in the process of identity development. The institution in which we have the closest semblance of universal democratic participation is not the franchise, but the marketplace. The majority of Americans may not exercise their political rights to vote at the polls biennially on election day, but we exercise our economic rights at the store (or cybershop) on a daily basis. And, through these myriad quotidian decisions, we cast our monetary votes by spending our dollars. These economic votes—cast as consumption decisions—are a central part of our individual definition.

As Hegel once observed:

A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all “things.”⁸⁰

It is through this exercise of the individual will over material objects in the external world that personhood or identity—previously a nebulous, inchoate, and malleable concept—actualizes. To Hegel, individual definition comes into being from simultaneously differentiating oneself from one’s physical

80. GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* para. 44, at 41 (T.M. Knox trans., Clarendon Press 1952) (1821).

environment, while maintaining relationships with parts of that environment.⁸¹

Thus, the actualization of personhood comes about through acts of consumption—our interaction with objects in the external world—and personhood interests manifest themselves through consumption in at least two ways: in the *formation* of personhood and in the *expression* of personhood. Formation of personhood takes place internally as an individual's identity is shaped through interaction with objects in the external world. Meanwhile, the expression of personhood occurs when the individual communicates some aspect of her (already formed) identity to others as a way of contextualizing herself, through her relationship with objects, within the broader community.

Individual consumption of property therefore serves as a powerful tool for both identity formation and expression. This relationship becomes clear when one considers the interaction of individuals with their property. With respect to the formation and development of identity interests, Erving Goffman famously documented the critical role that the mere private possession of objects plays as a mechanism for asylum patients to maintain a sense of self.⁸² Indeed, property interests arguably can even advance the survival of individual identity. An empirical study on the lives of nursing home residents by psychologists Ellen Langer and Judith Rodin demonstrates the powerful impact that the exertion of control over property can have on individuals.⁸³ In the experiment, half of the studied residents were invited to select a plant and were then charged fully with the rights to the plant and the responsibility for its care.⁸⁴

81. As Hegel posits:

A person must translate his freedom into an external sphere in order to exist as Idea. Personality is the first, still wholly abstract, determination of the absolute and infinite will, and therefore this sphere distinct from the person, the sphere capable of embodying his freedom, is likewise determined as what is immediately different and separable from him.

...

As the concept in its *immediacy*, and so as in essence a unit, a person has a *natural* existence partly within himself and partly of such a kind that he is related to it as to an external world.

Id. at paras. 41, 43.

82. ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 18–21 (1961).

83. Ellen J. Langer & Judith Rodin, *The Effects of Choice and Enhanced Personal Responsibility for the Aged: A Field Experiment in an Institutional Setting*, 34 *J. PERSONALITY & SOC. PSYCHOL.* 191, 191 (1976).

84. *Id.* at 193–94.

As such, they exercised complete dominion over the plant.⁸⁵ The other half of the residents were “given” a plant, selected by others for them, and were limited in what they could do with that plant—responsibility for its care, for example, was left exclusively to the nursing staff and not the resident.⁸⁶ In this situation, they possessed only the weakest of property rights in “their” plant.⁸⁷ Among other things, the study and its follow-up research found that those residents who were given rights to and responsibility for the plants ultimately enjoyed significant health benefits and possessed one-half the mortality rate of those without strong property rights to and responsibilities for their plant.⁸⁸

With respect to the expression of identity interests, consider the ways in which individuals customize tangible goods to suit their particular “needs” and then consume/use these goods publicly. People customize their cars, tricking them out as hot rods or using them as vehicles for political expression, and astute car marketers have increasingly drawn upon the relational interface between a car and its driver to push products. Witness the success of Scion, Toyota’s junior vehicle line. A lifestyle brand aimed at a young male demographic, Scion cars are sold as customizable cars with a plethora of options, all aimed towards enabling an owner to individualize the brand to match his lifestyle, values, and identity.⁸⁹ Scion has even encouraged interaction with the brand in such experimental events as “Scion Dashboard,” a series of rave-like events in major American cities where cutting-edge artists and disk jockeys interact with bystanders and render their own interpretations of the Scion brand with multimedia tools provided by Scion.⁹⁰

85. *Id.* at 194.

86. *Id.*

87. *Id.* at 193–94.

88. *Id.* at 197; Ellen J. Langer & Judith Rodin, *Long-Term Effects of Control-Relevant Intervention with the Institutionalized Aged*, 35 J. PERSONALITY & SOC. PSYCHOL. 897, 899–900 (1977).

89. See Frequently Asked Questions, SCION, <http://www.scion.com/faq/mission> (last visited Sept. 11, 2010) (listing mission statement as “[t]o satisfy a trendsetting youthful buyer through distinctive products and an innovative, consumer-driven process,” and presenting “The Scion Promise,” which states that the “[s]tandards that are at the heart of the Scion culture” are “Openness,” “Flexibility,” and “Personalization”).

90. Joe Mandese, *The Art of the Brand Name: Zenith Uses Canvass as Media*, MEDIAPOST NEWS (Apr. 21, 2006 8:15 AM), <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=42524&Nid=19928&p=337411>.

Similarly, people customize their clothing in multiple ways, to the point where a pair of pants communicates a wholly different message when it is merely hanging, un-customized, in a store window than when it is worn, and customized, by an individual. Think of the myriad alterations of jeans—rolled, torn, frayed, faded, acid washed, and bejeweled. Both the “look” and the symbolic meaning of the jeans transform radically when placed in a particular context or when worn in a particular way. For example, let them ride low and baggy for a “hip-hop” look that challenges dominant middle-class aesthetics.⁹¹ Or don a pair of women’s jeans, preferably skinny, for the male “indie-punk” look that challenges traditional gender divisions.⁹²

In his landmark analysis of popular culture, John Fiske discusses the cultural semiotics of denim.⁹³ As a hallmark of the American West—and, as John Fiske notes, “possibly America’s only contribution to the international fashion industry”⁹⁴—jeans evoke the mythology of the frontier in our collective imagination, and thereby embody “not only the familiar [meanings] of freedom, naturalness, toughness, and hard work (and hard leisure), but also progress and development and, above all, Americanness.”⁹⁵ Worn by locals in more traditional societies, jeans can also connote resistance to authoritarianism and repression or an embrace of Western decadence and youthful rebellion. Jeans and their various styles are, therefore, laden with meaning.

One’s “customization” of jeans is of particular salience. The contemporary trend of wearing “disfigured” jeans (i.e., jeans that are irregularly bleached, dyed, or torn) can be read as a distancing of oneself from, but not a complete rejection of, dominant American values. As Fiske reminds us, “[t]he wearer of torn jeans is, after all, wearing jeans and not, for instance . . . Buddhist-derived robes”⁹⁶ Thus, the “disfigured” jean re-

91. See Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*, N.Y. TIMES, Aug. 30, 2007, at G1 available at <http://www.nytimes.com/2007/08/30/fashion/30baggy.html> (noting the hip-hop look, replete with sagging pants, “is worn as a badge of delinquency, with its distinctive walk conveying thuggish swagger and a disrespect for authority.”).

92. See Amanda Marcotte, *Nothing New About Gender-Bending Fashion*, DOUBLE X (Nov. 19, 2009, 2:55 PM), <http://www.doublex.com/blog/xxfactor/nothing-new-about-gender-bending-fashion>.

93. JOHN FISKE, UNDERSTANDING POPULAR CULTURE 4 (1989).

94. *Id.*

95. *Id.*

96. *Id.*

veals a complex and contradictory relationship with mainstream mores. And such a tack is not surprising, as popular culture is frequently imbued with paradoxical tensions. Writes Fiske:

Popular culture . . . always bears within it signs of power relations, traces of the forces of domination and subordination that are central to our social system and therefore to our social experience. Equally, it shows signs of resisting or evading these forces: popular culture contradicts itself.

. . . So jeans can bear meanings of both community and individualism, of unisexuality and masculinity or femininity. This semiotic richness of jeans means that they cannot have a single defined meaning, but they are a resource bank of potential meanings.⁹⁷

On one hand, the universality of jeans in American life serves an important purpose—it allows us, in the relevant social situations, to blend together and present the image of mythic America without class differentiation. Dressed in jeans, we are all members of the working class sharing a core set of basic values. On the other hand, the customization of jeans supports notions of individuality. For example, the genteel mutilation of their traditional form subtly challenges and subverts some of society's core values—including those related to gender divisions, notions of propriety and formality, racial and class lines, and aesthetic judgments.

All told, individuals negotiate their relationship with physical property in numerous ways each and every day as a basic mechanism of identity actualization, both in forming their identity internally, and in defining and expressing themselves to the outside world. And they are given room to do so without running afoul of the law. After all, if you purchase a pair of jeans, it becomes a tangible piece of property that you own, and you can modify it to suit your tastes or cater to your expressive impulses. But with intellectual property, acts of consumption, customization, and communication are fraught with potential legal liability and they are directly restrained by the features of the copyright and trademark monopolies. As we shall see, the contours of our intellectual property regime therefore play a

97. *Id.* at 4–5.

significant role in mediating the formation and expression of identities.

B. Regulating Consumption, Customization, and Contextualization: Intellectual Property Law and the Mediation of Identity Interests

Intellectual property laws directly mediate the vindication of formative and expressive identity interests. The modern copyright and trademark regimes do not allow individuals to manipulate and utilize intellectual property in the same way that they can customize and contextualize their experience with physical property. Simply put, most customizations or contextualizations of intellectual property are considered potential violations of a copyright owner's exclusive rights under the Copyright Act⁹⁸ or a trademark owner's rights under the Lanham Act.⁹⁹ So, for example, by performing the equivalent of ripping holes in one's jeans (e.g., remixing a song or altering a brand name), a consumer of intellectual property runs afoul of a copyright holder's exclusive right to create derivative works or a trademark holder's right to prevent dilution. One can contextualize and communicate one's relationship with one's jeans by wearing them in public, but the equivalent act of publicly utilizing a copyrighted work would impinge on an author's exclusive right to control public displays and performances.¹⁰⁰ In twenty-first century America, our relationship with intellectual property is an essential part of defining ourselves. And in an increasingly digital and virtual world, the semiotic value of intellectual property is just as significant as physical property, if not more so.

Our identity interests therefore can become intermingled with and wrapped up in a form of property to which we technically, and legally, possess no ownership rights.¹⁰¹ Since intellectual property laws control access to and manipulation of cultural content—books, art, architecture, photographic images, and music—this sacralization has profound epistemological consequences. While we develop relationships with our personal property, we do not develop relationships with the remote

98. 17 U.S.C. § 106(1)–(6) (2006).

99. 15 U.S.C. §§ 1114, 1125 (2006).

100. 17 U.S.C. § 106(4)–(5).

101. *Id.* § 202 (noting that ownership of copyright is separate and apart from ownership of a tangible work that embodies a copyright).

physical property of others. The exclusive and rivalrous nature of private physical property means that fans do not enjoy a relationship with Bono's car, his house, or his personal jet. But they do have a relationship with his melodies and lyrics, his persona and look—his intellectual property, which digital technology can readily disseminate to the four corners of the earth. We mix and interact with intellectual property precisely because of its non-exclusive nature and the fact that ownership of it can be separated from ownership of the physical vessel through which it is delivered. In fact, owners of intellectual property often encourage such mingling, so it can serve to increase the market value of their intellectual property.¹⁰² In the liner notes to R.E.M.'s greatest hits collection, *In Time*, guitarist Peter Buck echoes the sentiments of Michael Stipe and his other bandmates when he discusses the group's relationship to its hit song, "Everybody Hurts": "This song doesn't really belong to us anymore; it belongs to everybody who has ever gotten solace from it."¹⁰³ Buck's statement is not just metaphoric. Music embeds itself in our neurological circuits; as philosopher Colin McGinn writes, "musical memory connects with our sense of self, since musical taste and experience are closely linked to personality and emotion. The music we remember is, without exaggeration, part of who we are."¹⁰⁴

Intellectual property laws impact both the formation and expression of personhood. First, our intellectual property regime shapes identity formation by regulating access to and use of cultural content, thereby determining which creative works individuals can interact with and how they can interact with them. Without the ability to access and consume works, an individual's identity cannot be shaped by those works. To illu-

102. For example, movie studios frequently encourage potential viewers to interact with upcoming releases through a film's website. In the case of the popular *Twilight Saga*, consumers can download wallpapers, widgets, and instant messaging icons. *Twilight: The Movie*, <http://www.twilightthemovie.com> (last visited Sept. 11, 2010). Furthermore, the website encourages consumers to create their own *Twilight* "virtual characters" through the cyber-community of habbo.com. See Andrew Stewart, "Twilight' to Get a Virtual World," VARIETY (Sept. 2, 2009, 12:05 PM), <http://www.variety.com/article/VR1118008022.html?categoryId=1009&cs=1>.

103. R.E.M., *IN TIME: THE BEST OF R.E.M.* (Warner Bros. 2003) (liner notes for "Everybody Hurts").

104. Colin McGinn, *The Musical Mystery*, N.Y. REV. OF BOOKS, Mar. 6, 2008, available at <http://www.nybooks.com/articles/archives/2008/mar/06/the-musical-mystery> (reviewing OLIVER SACKS, *MUSICOPHILIA: TALES OF MUSIC AND THE BRAIN* (2008)).

strate the effect that exposure to certain pieces of intellectual property can have on the development of the self, consider *The Lives of Others*—Florian Henckel von Donnersmarck’s Academy-Award winning drama about life under the police state in East Germany.¹⁰⁵ In the film, Captain Gerd Wiesler, a stern Stasi bureaucrat living a Spartan, monastic existence and exhibiting an unwavering, joyless commitment to his work, is charged with spying on playwright Georg Dreyman, a suspected subversive.¹⁰⁶ Although he initially takes upon the assignment with his usual solemn sense of duty, Wiesler undergoes a poignant transformation and begins to question, for the first time, his unsavory mission after coming upon Dreyman’s volume of Bertolt Brecht’s works and reading the poem “Remembrances of Marie A”.¹⁰⁷ His interaction with the poem reignites his sense of humanity and causes him to forgo his customary interrogation when a neighborhood child recounts a critical comment that his father had made about Stasi.¹⁰⁸ Wiesler’s new-found perspective then leads him to make a series of choices to protect Dreyman and his artist friends from Stasi—decisions that ultimately cost Wiesler his career.¹⁰⁹ The potential impact of art on one’s character is not merely fodder for fiction. As it turns out, the auteur of *The Lives of Others* found thematic inspiration from the real world: the relationship with art of one of the twentieth century’s most significant political figures. In a famous anecdote, Maxim Gorky recounted Lenin’s sentiments towards Beethoven’s *Appassionata*:

I know of nothing better than the *Appassionata* and could listen to it every day. . . . But I can’t listen to music very often. It affects my nerves. I want to say sweet, silly things and pat the heads of people who, living in a filthy hell, can create such beauty.¹¹⁰

Intellectual property’s role in developing the personhood of consumers is not limited to the internal formation of identity. By controlling the ability of individuals to exhibit or display

105. *THE LIVES OF OTHERS* (Sony Classic Pictures 2007).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. John Podhoretz, *Nightmare Come True*, *THE WEEKLY STANDARD*, Mar. 12, 2007, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/360jfrwt.asp>.

publicly their use of cultural content, our intellectual property regime also impacts the way in which individuals can express personhood interests to the external world. As Kurt Vonnegut famously observed: “We are what we pretend to be”¹¹¹ Thus, the expressive use of cultural content before the public does not merely represent one interpretation of our identity, as framed for the outside world; rather, it arguably represents the reflection of our identity’s very essence. Visible consumption of intellectual property also serves a vital semiotic purpose by communicating one’s complex web of entanglements with social, cultural, political, and economic networks and by facilitating one’s interaction with the broader community. Without the ability to exhibit or display one’s uses of certain works to the public, one cannot effectively communicate such contextualized relationships.

Indeed, as Jean Baudrillard posits, the primary function of products no longer lies in their use, but rather in their communicative status.¹¹² While one may quibble with this assertion when considering products that provide basic sustenance—to the hungry, the primary function of a loaf of bread is still very much in its use as food—Baudrillard’s point is particularly salient in richer societies and in the context of intellectual property. With trademarks, the process of branding and the act of conspicuous consumption communicates social status, exclusivity, and affiliation.¹¹³ Meanwhile, users merge their own sense of self with creative works that enjoy copyright protection and draw upon these works for expressive purposes, especially when seeking to couch their interests or activities within a particular cultural context. “[A]ll consumption is cultural,” as sociologist Don Slater has argued, because “in order to ‘have a need’ and act on it we must be able to interpret sensations, ex-

111. KURT VONNEGUT, *MOTHER NIGHT*, at v (Dell Publishing 1999) (1961). Vonnegut went on to warn, “so we must be careful about what we pretend to be.” *Id.*

112. JEAN BAUDRILLARD, *THE CONSUMER SOCIETY* 25 (Sage Publications 1998) (1970); see also F. Vigneron & L.W. Johnson, *A Review and a Conceptual Framework of Prestige-Seeking Consumer Behavior*, 1999 ACAD. OF MARKETING SCI. REV. 1, 4, available at <http://www.amsreview.org/articles/vigneron01-1999.pdf>.

113. See generally THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* (Random House 1934) (1899) (coining the term “conspicuous consumption” to refer to the act of using one’s consumption activities to manifest social power); Stephen Wearing & Betsy Wearing, *Smoking as a Fashion Accessory in the 90s: Conspicuous Consumption, Identity and Adolescent Women’s Leisure Choices*, 19 LEISURE STUD. 45, 46 (2000) (defining conspicuous consumption as “the purchase of goods for display as a means of asserting privilege and status”).

periences, and situations and we must be able to make sense of (as well as transform) various objects, actions, resources in relation to these needs.”¹¹⁴ This act of making sense is necessarily grounded in a cultural context of shared meanings, for “when we meaningfully formulate our needs in relation to available resources, we draw on languages, values, rituals, habits, and so on, that are social in nature, even when we individually contest, reject, or reinterpret them.”¹¹⁵ Individuals define their relationship with, and status in, their social milieu—be it oppositional or harmonious, insider or outsider—through their consumptive actions.

To illustrate the expressive personhood interests implicated with the use of intellectual property in the digital environment, witness the communication of identity on social networking sites such as MySpace.¹¹⁶ Along with rival Facebook,¹¹⁷ the site is one of the most popular destinations on the Internet, especially for the teenage and twenty-something crowd. The site allows individuals to create their own home webpage on the MySpace system and then to link their page to those of their other friends. By allowing individuals to customize their own webpages within the confines of the general parameters of the site’s format, MySpace is a laboratory of identity expression and an ideal place to contemplate the intersection of intellectual property and identity politics.

A typical MySpace user webpage organizes itself along three different axes. First, individuals define themselves through their *physical property*—both by noting their incomes and by contextualizing their bodies with such information as its size (height and weight), where it resides (geographical location), and what it ingests (drinking and smoking habits). Second, individuals define themselves through their *relationships* to other individuals, and institutions (friends, schools, and social groups). Finally, individuals define themselves through *intellectual property*. They do this in several ways. Users describe their likes and dislikes—specifically, their favorite books, movies, television shows and music. In other words, individuals define themselves through the *intellectual property*

114. DON SLATER, CONSUMER CULTURE AND MODERNITY 132 (1997).

115. *Id.*

116. MYSPACE, <http://www.myspace.com>. Since 2006, media conglomerate News Corporation has owned MySpace. See *News Corp in \$580m Internet Buy*, BBC NEWS (July 19, 2005, 9:03 AM), <http://news.bbc.co.uk/2/hi/business/4695495.stm>.

117. FACEBOOK, <http://www.facebook.com> (last visited Sept. 11, 2010).

they consume. A taste for *The Daily Show* might signal liberalism, a fondness for irreverent humor, or a blue-state alignment. Meanwhile, an appreciation for *The O'Reilly Factor* might communicate conservatism, a strong interest in the culture wars, or a red-state alignment. Meanwhile, these profiles do not merely reference intellectual property; they often make active (and frequently unauthorized) use of it. Users will frequently decorate their pages with wallpaper that reproduces (usually without permission) copyrighted works or trademarked logos, including celebrity photographs, works of art, and stylized band names. Users can also customize their site to stream a particular song when visitors arrive. The emo teen can play Death Cab for Cutie's "I Will Possess Your Heart", the audacious prom queen can blast Beyoncé's "Single Ladies (Put a Ring on It)", and the gangsta-wannabe can crank the latest rhymes from Flo Rida, all to the effect of creating a strong implied nexus between the song and the individual. They also decorate their pages with the trademarks of certain bands and brands in order to communicate social identity.¹¹⁸ The Veblenian¹¹⁹ references to and uses of intellectual property (i.e., its *conspicuous* consumption) on a MySpace page communicate important details about users' perceived relationships with the world, their self-images or desired portraits, and their links to certain social, cultural, or political identifiers, networks, and groups.

Finally, the divide between formative and expressive uses of intellectual property is by no means rigid or absolute. Interacting with cultural content can sometimes advance both identity interests. Consider basketball superstar LeBron James rapping loudly to Eminem's verse in Drake's "Forever"—a brash celebration of the self, indulgence, and conquest—during a timeout in an NBA game in early 2010.¹²⁰ James's team at the time, the Cleveland Cavaliers, held a slim 89-87 lead over the Los Angeles Lakers with a mere 23.4 seconds left in the fourth quarter. First, based on the timing of the use and its fervor, James's rapping of the song and its music and/or lyrics may well have had an internal impact on James by igniting

118. See Mark Bartholomew, *Advertising and Social Identity*, 58 BUFF. L. REV. 931, 942 (2010) (noting how MySpace users decorate their pages with trademarks to reflect identity interests).

119. See *supra* note 113.

120. See C.Y. Ellis, LeBron James, Fan of Eminem, HOOPSVIBE.COM (Jan. 22, 2010), <http://www.hoopsvibe.com/gossip/articles/79638-lebron-james-fan-of-eminem>.

his sense of competition and ego, filling him with confidence and pumping him up to join his team on the floor and lead them to victory—something he ultimately accomplished when the Cavaliers held on for the 93-87 win. Thus, the use of the song affected James, ultimately actualizing a part of his personality. Second, the song was expressive—it was done in public and communicated to the arena audience and millions who saw the game on television—thereby contextualizing LeBron within the global community of Eminem fans and those who relate to the particular messages of his songs.

All told, as these examples indicate, identity is a pastiche of the tangible, intangible, and relational that is frequently mediated by intellectual property. We construct our narrative plots by incorporating cultural signifiers, many of which constitute copyrighted content. In the process, we inevitably mingle elements of ourselves with the copyrighted works of others to create the *mélange* that communicates self-definition in the twenty-first century. Yet, increasingly, the law sees our identities as unauthorized derivative works.

C. *Intellectual Property and Identity Politics: Four Case Studies*

As we have seen, intellectual property laws negotiate identity formation by regulating the consumption of cultural content for personal development purposes. They also impact identity expression by controlling the public display or exhibition of cultural content for semiotic purposes. And, it is through the exertion of ownership rights that user interests in both identity formation and expression can be curtailed.

To illustrate this process, we turn to four case studies relating to four different doctrinal aspects of our intellectual property regime: the limited exemption of some federal, but not state or local, government works from copyright protection; the notion of “authorship” that triggers copyright protection; the expansion of *sui generis* protections beyond their traditional bounds (e.g., trademark infringement actionable without showings of consumer confusion); and the sizeable (and growing) duration of the copyright term. As our examples—which involve Old Glory and the Lone Star flag, *The Serenity Prayer*, the term “Olympics,” and the song “Kookaburra”—illustrate, such features of our intellectual property regime enable potential rights holders to patrol uses of patriotic symbols, important re-

ligious works, our very language, and key aspects of our cultural heritage. In the end, the exertion of exclusive rights granted to putative authors of copyrightable subject matter can therefore undermine the rights that individual users of these works have in the formation and expression of national, spiritual, sexual, and cultural identities. The regulation and control of access to intellectual property can impact one's relationship with one's cultural community, one's country, and even one's god. IP (intellectual property) directly mediates IP (identity politics).

1. Patriotism, Cultural Patrimony, and the Propertization of the American Flag

In our first example, we examine how features of our copyright regime enable the potential beatification of certain key cultural and political symbols, thereby protecting them from unwanted use and manipulation. This, in turn, impacts the rights that individuals have in identity expression.

Under federal law, some government works—but not all—are exempt from copyright protection. Specifically, section 105 of the Copyright Act dedicates the creative output of the *federal* government—but not that of the state or local governments—to the public domain.¹²¹ However, nothing prevents the federal government from holding copyright interests.¹²² Specifically, the federal government can hold the rights to works that it did not author, but which are assigned to it.¹²³ Based on these features of the Copyright Act, it would be entirely possible for government entities to claim copyright protection in such works imbued with patriotic and symbolic meaning as flags. After all, assuming the apocryphal tale that Betsy Ross created Old Glory is true, she could have assigned her copyright to the government, which the feds have ultimately enforced for the duration of its term. In addition, each new version of the flag could potentially receive a new copyright.¹²⁴ For example, the new-

121. 17 U.S.C. § 105 (2006) (deeming that “[c]opyright protection under this title is not available for any work of the United States Government”).

122. As section 105 of the Copyright Act provides, the exemption for copyright in federal government works does not preclude the federal government “from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.” *Id.*

123. *Id.*

124. Provided the changes or additions possess the requisite originality, a new copyright can be secured for the revised flag. See, e.g., *Waldman Publ'g Corp. v.*

est version of the American flag, which features fifty stars for the fifty states, only came into being with the admission of Hawai'i to the Union in 1959. As such, the current American flag could continue to enjoy copyright protection. Just as importantly, there is nothing preventing states or municipalities from protecting their flags or seals under federal copyright law.¹²⁵

If either the federal government or the states began to enforce copyrights in flags, the consequences for individual rights, especially identity expression interests, could be dramatic. Pursuant to section 106(5) of the Copyright Act, the holder of the copyright to the flag could enjoy the exclusive right to control, among other things, its public display, especially if the government characterized all physical transfers of the flag as licenses.¹²⁶ To fly the flag, one would need the express permission of the government. Disfavored displays of the flag or uses on clothing could trigger cease and desist letters that, unheeded, could lead to suits for injunctions and damages. The mere reproduction of the flag in association with unpopular causes might result in sizeable liability.¹²⁷ In sum, friends of the government would enjoy the right to raise the flag and honor our country at their whim while foes doing the same would risk significant legal consequences. The ability to align oneself or one's organization with patriotic values would be de-

Landoll, Inc., 43 F.3d 775, 782 (2d Cir. 1994) (noting that, to qualify for protection as a derivative work and to be separately copyrightable, the derivative must contain "a distinguishable variation that is more than merely trivial" and that "[t]he test of originality is concededly a low threshold"). Of course, the new copyright would only extend to the new elements in the flag.

125. The language of section 105 refers only to "any work of the United States Government." 17 U.S.C. § 105. As a result, although federal statutes are not protected by copyright law, states, and municipalities have occasionally asserted copyright protection over their laws. In 2008, for example, Oregon's Office of Legislative Counsel began sending out cease and desist letters to a number of online entities such as Justia.com and Public.Resource.org, claiming infringement of the Oregon Revised Statutes. See Cory Doctorow, *Oregon: Our Laws Are Copyrighted and You Can't Publish Them*, BOINGBOING (Apr. 15, 2008, 10:26 PM), <http://www.boingboing.net/2008/04/15/oregon-our-laws-are.html>.

126. The government would need to circumvent the provisions of section 109(c), which allow certain automatic display rights for owners of a legitimate copy of a copyrighted work; but that might be accomplished by characterizing every "sale" of a flag as merely a license, subject to certain terms and conditions. See 17 U.S.C. § 109(c) (2006).

127. Copyright law, of course, provides plaintiffs who have timely registered their copyrighted works with the option of recovering statutory damages, even in instances where actual damages did not occur or would be impossible to prove. *Id.* § 501(c)(1).

terminated by the rights holder to Old Glory, the Lone Star flag, or Ka Hae Hawai'i's. Thus, the exertion of copyright over flags would lead to a means of controlling access to what are perhaps our most important national and state symbols.

Even if one gets past the public display issue by arguing fair use¹²⁸ or waiver by virtue of the government having designated a particular design as the national or state flag, the problematic relationship between intellectual property and patriotic symbols does not end. Under section 106(2) of the Copyright Act, copyright holders alone enjoy the privilege of creating derivative versions of their works.¹²⁹ As such, not only do the famous artistic interpretations of the American flag by Jasper Johns and others risk liability and interdiction, but something more unusual might occur: flag burning could be banned.

Efforts to outlaw flag burning by direct statute have famously failed. In 1989, the Supreme Court deemed a Texas statute criminalizing the conflagration of the American flag as unconstitutional on First Amendment grounds.¹³⁰ A federal statute with similar operation was struck down in 1990.¹³¹ However, courts have shown little compunction about enforcing intellectual property laws, especially copyright, in the face of potential First Amendment problems. As the Supreme Court has argued, you may have a right to *your own* free speech, but not to make or use the speech (i.e., the copyrighted works) of *others*.¹³² Indeed, one could argue that the burning of a flag is the production of an unauthorized derivative work. The argument has had traction in other contexts. Several appellate courts have found that taking a copyrighted work and permanently mounting it without the permission of a copyright holder can constitute the creation of an unauthorized derivative

128. Fair use, of course, could theoretically protect many interests, including the personhood interests discussed in this Article, by shielding individuals from liability over claims of copyright infringement. However, the fair use protections are inadequate in practice for a number of reasons. Among others, fair use is notoriously ambiguous, provides no *ex ante* protection against costly copyright litigation, and constitutes an affirmative defense for which a defendant bears the burden of proof. *See generally*, Tehranian, *supra* note 18. Moreover, most of the fair use factors focus on what is being taken from a rights holder, rather than on what kind of use is being made of the work. As such, the fair use test, as presently constituted, adopts a strong natural-law vision of authorial rights. *Id.* at 508.

129. 17 U.S.C. § 106(2) (2006).

130. *Texas v. Johnson*, 491 U.S. 397, 418–20 (1989).

131. *United States v. Eichman*, 496 U.S. 310, 317 (1990).

132. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

work in violation of 17 U.S.C. § 106(2).¹³³ Courts have similarly suggested that the mutilation of a copyrighted work can constitute an act of infringement.¹³⁴ After all, the Copyright Act specifically excludes architectural works from this potential consequence of the derivative rights doctrine.¹³⁵ The existence of such terms for architectural works suggests that, for copyrightable subject matter outside of architecture, alteration, mutilation, or destruction might in fact give rise to the creation of a derivative work in violation of section 106(2). Given the tenor of recent intellectual property decisions,¹³⁶ it is not unfathomable that a court might dismiss any free-speech implications by arguing that copyright law, as a neutral law of general application, does not target speech for content, and that, if one wants to destroy a flag, one is free to create and destroy one's own flag with a different design. As such, it is not too far afield to inquire whether the scenario recounted above might arise upon the burning of the Lone Star flag, for example. The State of Texas could very well copyright its flag and proceed to regulate the use of the flag in the manner in which any intellectual property rights holder restricts use of its creative output.

The control that copyright law might provide over such symbols as flags illustrates its ability to mediate meaning, identity, and relationships. Indeed, command of important patriotic, humanistic, and cultural symbols is regularly achieved through intellectual property law, thereby impacting notions of Americanness, patrolling insider-outsider boundaries within mainstream society, and limiting expressive activities that are central to the development of one's identity. Just as subtle differences in the way individuals wear their jeans can situate

133. In *Munoz v. Albuquerque A.R.T. Co.*, for example, the Ninth Circuit affirmed an Alaska federal district court's decision that the mounting of purchased art works on a tile constituted the creation of a derivative work in violation of the Copyright Act. 38 F.3d 1218 (9th Cir. 1994) (depublished), *aff'g* 829 F. Supp. 309 (D. Alaska 1993); *see also* *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir.1988); *but see* *Lee v. A.R.T. Co.*, 125 F.3d 580, 583 (7th Cir. 1997) (rejecting the logic of *Munoz* and *Mirage Editions*).

134. *See, e.g.*, *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 21 (2d Cir. 1976) (finding that the "unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright").

135. 17 U.S.C. § 120(b) (2006) ("Notwithstanding the provisions of section 106(2), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.").

136. *See Eldred*, 537 U.S. at 221.

their complex relationship with American ideals and mainstream mores, communal versus individualistic values, and gender, racial, and class divides, so too do one's uses and manipulations of the American flag. In regulating, and even forbidding, certain forms of consumption and customization, intellectual property law inevitably impacts processes of identity expression. And the fact that only certain government works—those actually authored by the federal government and not assigned to it—are dedicated to the public domain creates a direct conflict between individual rights of identity expression in critical symbols of collective heritage and our intellectual property regime as currently constituted. After all, it is precisely government works—content that speaks for and represents the collective state or nation producing them—that are the types of creative output most likely to be imbued with powerful ontological meanings for a state's or nation's citizens.

2. Propertizing Prayer: Creation Stories and Copyright

As a default rule, the author of any creative work fixed in a tangible medium owns the copyright to the work¹³⁷ and therefore receives the exclusive right to reproduce, derivatize, distribute, publicly perform, and publicly display that work¹³⁸ for a period of the lifetime of the author plus seventy years.¹³⁹ Thus, an author receives dramatic rights of exclusion vis-à-vis the rest of the world. However, the issue of authorship is not always easy to determine. This is especially so when a work is the result of numerous efforts by multiple individuals—collective efforts that make a grant of exclusive rights to a single putative author potentially inequitable.

Copyright law fosters a myth of purity by advancing an image of creation as a deific act solely traceable to the inspiration and genius of the author.¹⁴⁰ With this genesis narrative in

137. See 17 U.S.C. § 201 (2006) (vesting ownership in a copyright and, with it, the exclusive rights secured thereunder in the author of the work unless the work is made-for-hire).

138. See *id.* § 106 (granting the owner of a copyright the exclusive right to reproduce, derivatize, distribute, publicly perform, and publicly display the work).

139. *Id.* § 302(a) (granting individual authors a copyright term of their lifetime plus seventy years).

140. Anne Barron, for example, argues:

It has become a commonplace of critical legal scholarship that copyright's primary social function is to give jurisdictional form to a "Roman-

place, copyright law grants authors exclusive property rights to their creative output. According to the labor-desert theory of copyright, for example, authors receive monopoly-like control over certain forms of expression as a reward for their putative originality and intellectual efforts. However, a closer examination of the matter suggests that the notion of authorship is fraught with complexity, as the creative process usually involves more than just a single author acting *ex nihilo* to bring great art to life. In many cases, the process is irretrievably iterative,¹⁴¹ and the consequences of placing exclusive control of a given work in the hands of a putative “author,” rather than dedicating it to public use, can impact both identity formation and expression.

To begin with, the idea of purity and the notion of tracing any innovation to a single source are concepts fraught with oversimplification. Consider the world of food. Tomato sauce and pasta are inextricably associated with Italian cuisine, and we typically view both products as integral to any “authentic” old-fashioned Italian meal. But that view is largely misguided.

tic” aesthetic; that the key doctrinal features of copyright law—especially the concept of authorship—have been crucially shaped by this aesthetic; and that the law of copyright is centrally oriented towards promoting forms of cultural production that comply with the core values of the Romantic movement.

Anne Barron, *Copyright Law and the Claims of Art*, 4 INTELL. PROP. Q. 368, 368 (2002); see also Shubha Ghosh, *Enlightening Identity and Copyright*, 49 BUFF. L. REV. 1315, 1317 (2001) (noting that “[c]opyright law is premised on the assumption of the ‘romantic author’—the lone genius that creates valuable expression”); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29, 35 (Martha Woodmansee & Peter Jaszi eds., 1994) (positing that “[t]he instance of ‘moral rights’ is but one example of how the Romantic conception of ‘authorship’ is displaying a literally unprecedented measure of ideological autonomy in legal context”).

141. For example, Jessica Litman argues:

All authorship is fertilized by the work of prior authors, and the echoes of old work in new work extend beyond ideas and concepts to a wealth of expressive details. Indeed, authorship *is* the transformation and recombination of expression into new molds, the recasting and revision of details into different shapes. What others have expressed, and the ways they have expressed it, are the essential building blocks of any creative medium. If an author is successful at what she does, then something she creates will alter the landscape a little. We may not know who she is, or how what she created has varied, if only slightly, the way things seem to look, but those who follow her will necessarily tread on a ground distorted by her vision. The use of the work of other authors in one’s own work inheres in the authorship process.

Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 243–44 (1991).

The tomato is indigenous to the New World and did not make its way to Europe until it was brought back by the Spanish in the sixteenth century.¹⁴² In the United States and in many parts of Europe, the fruit was grown only for ornamental purposes. For many centuries, tomatoes were actually considered poisonous.¹⁴³ This popular view persisted until the late eighteenth century, when fears receded after prominent individuals, such as Thomas Jefferson, vouched for the fruit's safety.¹⁴⁴ Meanwhile, pasta was not even known to the city-states that later became Italy until the Renaissance.¹⁴⁵ According to legend, Marco Polo brought noodles to Europe from China.¹⁴⁶ In short, an "authentic" traditional Italian meal might feature neither pasta nor tomato sauce.

The same observation extends to other purportedly "authentic" ethnic cuisines. While noodles actually came from China, the chili peppers often associated with spicy Szechuan cuisine are not indigenous to East Asia. In fact, it was not until European expansion into the New World that chili peppers made their way from their native lands in Central and South America across the Pacific.¹⁴⁷ Meanwhile, the plantains that now form a staple of Central and Latin American cuisine actually came from South Asia.¹⁴⁸ Potatoes, a quintessential feature of Germanic cuisine, are, of course, a New World discovery

142. J.M. Costa & E. Heuvelink, *Introduction: The Tomato Crop and Industry*, in TOMATOES 1, 2 (E. Heuvelink ed., 2005).

143. The tomato was often confused with the deadly nightshade. *Id.*

144. Jefferson was a pioneer in the growing of tomatoes. See, e.g., ANDREW F. SMITH, *THE TOMATO IN AMERICA: EARLY HISTORY, CULTURE, AND COOKERY* 28 (1994).

145. According to Silvano Serventi and Françoise Sabban, the "first concrete information concerning pasta products in Italy dates from the thirteenth or fourteenth century." SILVANO SERVENTI & FRANÇOISE SABBAN, *PASTA: THE STORY OF A UNIVERSAL FOOD* 10 (Antony Shugaar trans., Columbia Univ. Press 2002) (2000).

146. As Harold McGee notes: "It's a story often told, and often refuted, that the medieval traveler Marco Polo found noodles in China and introduced them to Italy." HAROLD MCGEE, *ON FOOD AND COOKING: THE SCIENCE AND LORE OF THE KITCHEN* 571 (Scribner 2004) (1984).

147. See Theopolis Fair, *Asia and Latin America in the Context of World History*, in ASIA IN WESTERN AND WORLD HISTORY 782, 787 (Ainslie T. Embree & Carol Gluck eds., 1997) (noting that "[b]efore 1492 black pepper was widely used, but native Americans used a totally unrelated plant of many colors, shapes and intensities The cooks of the subcontinent adopted these American peppers and cayennes and incorporated them into their dishes").

148. K. Pushkaran, *Genetic Diversity of Bananas in South India with Specific Reference to Kerala*, in BANANAS AND FOOD SECURITY 199, 200 (Claudine Picq et al. eds., 1998).

and did not make their way across the Atlantic until the 1500s.¹⁴⁹ The same is true of corn, a typical product of “traditional” African cuisines.¹⁵⁰ In short, many of the quintessential ingredients of national cuisines are relatively modern additions. An “authentic” ethnic meal is rarely so.

By the same token, the creation myths we assign to the origins of copyrighted works are similarly suspect. Just as tomato sauce and pasta are not “authentic” to Italian cuisine, we oversimplify matters when we assign authorship of certain expressions to a single individual. In his seminal work, *The Death of the Author*, published in 1968, Roland Barthes challenged the concept of authorship, positing that the “text is a tissue of quotations drawn from the innumerable centres of culture.”¹⁵¹ In the words of Christian Stallberg, “it is a common occurrence that intellectual works never originate exclusively from the person that authorship is attributed to. Instead, every author is integrated into the manifold social and cultural contexts from which he steadily borrows. Thus, creating intellectual works always means the appropriation of preceding ideas.”¹⁵² A generation after Barthes, digital media is allowing us to quantify just how far astray the mythology of authorial creation has led us.

To illustrate this point, consider the radical reassessment of originality being posed by Google’s book scan feature. In recent years, Google has begun to make all of the world’s published works text-searchable. Despite legal resistance and a major lawsuit from book publishers,¹⁵³ the effort—billed Google Books—continues.¹⁵⁴ The ability to text-search digital books is, of course, invaluable to research in a variety of ways. But, for our purposes, the most notable consequence of making humani-

149. See MICHAEL T. MURRAY, JOSEPH PIZZORNO & LARA PIZZORNO, *THE ENCYCLOPEDIA OF HEALING FOODS* 224 (2005).

150. 2 RICHARD M. JUANG, *AFRICA AND THE AMERICAS: CULTURE, POLITICS, AND HISTORY* 74 (2008) (noting that corn is native to the Americas and was introduced to Africa around 1500).

151. Roland Barthes, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142, 146 (1977).

152. Christian G. Stallberg, *Towards a New Paradigm in Justifying Copyright: An Universalistic-Transcendental Approach*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 333, 337 (2007–2008).

153. Elinor Mills, *Authors Guild Sues Google over Library Project*, *CNET NEWS* (Sept. 20, 2005, 3:12 PM), http://news.cnet.com/2100-1030_3-5875384.html.

154. See Alex Pham, *Google to Allow Booksellers to Profit from Digital Library*, *L.A. TIMES*, Sept. 11, 2009, at B3 (noting that Google continues to operate its Google Books project and has “open[ed] up its vast digital books archive to rival retailers who can access the books and sell them online”).

ty's literary output text-searchable is how it has begun to undermine the creation myths of copyrighted works. Librarians, historians, and bibliophiles have already used the feature to make some surprising findings about the origins of numerous works.

For example, while using Google Books as well as several other digital archives, Yale Law School librarian Fred Shapiro recently discovered that the most famous piece of liturgy in the twentieth century, *The Serenity Prayer*,¹⁵⁵ may not have been authored by theologian Reinhold Niebuhr—the man who has historically received credit for the text.¹⁵⁶ As Shapiro uncovered, various versions of *The Serenity Prayer*'s text had been published and in use as early as 1936—seven years before Niebuhr had apparently claimed its creation.¹⁵⁷ As Shapiro speculates, Niebuhr may have subconsciously¹⁵⁸ adopted the prayer as his own after having come into contact with prior incarnations.¹⁵⁹ It is entirely possible that the work was collective in nature, crowd-sourced in voluntary, educational, and religious circles for a number of years before being popularly attributed to Niebuhr.¹⁶⁰ If this is the case, arguably no single person or entity should possess strong property rights in the *Prayer*.

155. In its most well-known form, *The Serenity Prayer* reads: “God grant me the serenity to accept / the things I cannot change, / courage to change the things I can, / and wisdom to know the difference.” Fred R. Shapiro, *Who Wrote the Serenity Prayer?*, YALE ALUMNI MAGAZINE, July–Aug. 2008, at 34, 36, available at http://www.yalealumnimagazine.com/issues/2008_07/serenity.html.

156. *Id.* at 35.

157. *Id.* at 37–38. Interestingly, the prior versions of the Prayer unearthed by Shapiro were by women, all of whom were involved in some sort of volunteer and educational activity. Elisabeth Shifton, *It Takes a Master to Make a Masterpiece*, YALE ALUMNI MAGAZINE, July–Aug. 2008, at 40, 40, available at http://www.yalealumnimagazine.com/issues/2008_07/serenity.html.

158. In this sense, Niebuhr may have been no different than George Harrison, who was famously found liable for subconscious infringement. *See supra* note 36.

159. Shapiro, *supra* note 155, at 39. Elisabeth Shifton, Niebuhr's daughter, has adamantly denied Shapiro's allegations. In an intervention entitled *It Takes a Master to Make a Masterpiece*, she argues, among other things, that the prayer must have come from a gifted practitioner from a particular theological context who could have only been her father. Interestingly, the title of her article immediately plays into our most romantic notions of authorship, which seek to reduce creation to a lone genius rather than to the iterative and accretive contributions of many. Shifton, *supra* note 157, at 40–41.

160. In 2009, Duke researcher Stephen Goranson found a citation to Niebuhr as the prayer's author contained in a Christian students' newsletter published in 1937. Laurie Goodstein, *Serenity Prayer Skeptic Now Credits Niebuhr*, N.Y. TIMES, Nov. 28, 2009, at A11. Shapiro responded that “[t]he new evidence does not prove that Reinhold Niebuhr wrote [*The Serenity Prayer*], but it does significantly improve the likelihood that he was the originator,” and he lists the *Serenity*

Indeed, consider the intellectual property consequences of this creation myth, especially if Neibuhr had been inclined to enforce his potential intellectual property rights to the maximum extent allowable under the law. Neibuhr, as ostensible author of the *Prayer*, would have been granted a copyright in it, and that copyright could still be in effect.¹⁶¹ Besides the fair use doctrine, there would, of course, be certain limits on Neibuhr's control over the use of the prayer. In particular, section 110(3) of the Copyright Act exempts from infringement liability a "performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly."¹⁶² However, "[this provision] has never been cited in a reported decision,"¹⁶³ so there is little guidance on its use as a shield against claims of infringement. There is also a question as to whether a prayer is, in fact, a *nondramatic* literary work.¹⁶⁴ Moreover, there are arguments that the exemption under § 110(3) is actually unconstitutional. One might legitimately argue that the exemption "confers a special benefit upon religion in violation of the Establishment Clause,"¹⁶⁵ or that the exemption contravenes the Free Exercise Clause,¹⁶⁶ if one posits that the use of the prayer by a religious group of whom the author does not approve diminishes the author's free exercise rights. Finally, the exemption only permits public performance in the course of religious services and does not apply to reproduction of such works.¹⁶⁷

Thus, Neibuhr and his heirs could potentially control use of the *Prayer*, deciding which favored religious institutions might be allowed to use it and which ones might not be. After all, invocation of the *Prayer* at a religious service without per-

Prayer under Niebuhr's name in the most recent edition of *The Yale Book of Quotations*. *Id.*

161. This assumes he conformed to the strictures of the 1909 Copyright Act governing at the time and filed the necessary renewal to keep the copyright in effect.

162. 17 U.S.C. § 110(3) (2006).

163. Thomas Cotter, *Accommodating the Unauthorized Use of Copyright Works for Religious Purposes under the Fair Use Doctrine and Copyright Act § 110(3)*, 22 *CARDOZO ARTS & ENT. L.J.* 43, 59 (2004–2005).

164. The Code of Federal Regulations defines "[f]iction; nonfiction; poetry; textbooks; reference works; directories; catalogs; advertising copy; and compilations of information" as nondramatic literary works but mentions nothing about prayers. 37 C.F.R. § 202.3(b)(1)(i) (2008).

165. Cotter, *supra* note 163, at 60.

166. U.S. CONST. amend. I.

167. 17 U.S.C. § 110(3).

mission of the rights-holder may very well constitute an unauthorized public performance of the work in violation of the exclusive rights secured for copyright owners.¹⁶⁸ Alcoholics Anonymous—which has adopted the *Prayer* for its twelve-step program¹⁶⁹—would be beholden to the rights-holders for permission to use the *Prayer* at its meetings under all but the most generous readings of section 110(3). Millions who have found solace in the comforting words of the *Prayer* may have been denied its use (or would have had to pay a licensing fee). In short, copyright would impact both formative and expressive identity interests. The palliative use of the *Prayer*, and the internal comfort it has given to millions, could be significantly tempered. Meanwhile, its expressive use—its power as a collective benediction that forms a unifying bond, sense of community, and shared purpose among the friends of Bill W.—would be compromised.

The control of religious works through copyright law can allow a third-party to dictate aspects of a fundamental and intimate area of personal development—both in the formation of spiritual identity and in its expression.¹⁷⁰ In the case of *The Serenity Prayer*, what is likely to have been a work of many individuals, rather than one, has become reified as a work of one individual who, under copyright law, is then given the ability to control use by the many. Concepts of authorship and labor-desert are then elevated above user interests, with profound consequences on the way in which individuals can celebrate their religious convictions and develop their theological identities. This scenario is not merely relegated to the realm of the theoretical. In a panoply of cases, religious organizations have (often successfully) sought to enjoin the unauthorized use of their scriptures through claims of copyright infringement.¹⁷¹

168. *Id.* § 106(4) (granting the exclusive right for a work's public performance to a copyright holder).

169. See HAMILTON B., TWELVE STEP SPONSORSHIP: HOW IT WORKS 125 (1996).

170. See Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CALIF. L. REV. 323, 335 n.47 (2003) ("In the United States, religious works have constituted a significant portion of the works registered by copyright owners from the creation of federal copyright system in 1790.").

171. See, e.g., *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (reversing the district court's finding of fair use and holding that the reproduction and dissemination of a religious text entitled *Mystery of the Ages*, the copyright to which was held by the Worldwide Church of God, constituted copyright infringement by a splinter group using the text in the course of worship); *Religious Tech. Ctr. v. Henson*, No. 97-16160, 1999 WL 362837 (9th Cir. June 4, 1999) (affirming liability of defendant for copyright infringement of the

As a result, religious groups have silenced criticism of their doctrines and also effectively quashed the worship activities of splinter groups. With the assistance of the modern copyright regime, religious texts have become sacred—both spiritually and legally.

3. Owning the Word: Intellectual Property, Linguistics, and Identity

Language is a universal aspect of human communication. But, while we generally think of words as free for all to use, intellectual property laws actually regulate language in a variety of ways, granting exclusive ownership rights to words in certain contexts. Trademark law can proscribe the use of a single word as a designation of the source or origin of a product in a way that is likely to cause consumer confusion or dilution (through either blurring or tarnishment).¹⁷² Copyright law can prohibit the use of a string of words when it bears substantial similarity to a pre-existing string of words.¹⁷³ As we shall see, intellectual property's regulation of words can have a significant impact on both expressive and formative identity interests. First, the expression of identity is mediated by the use of language as a tool of cultural semiotics and political discourse. Second, the regulation of language impacts identity formation by literally determining the range of our informational and conceptual palettes for personal development.

The impact of intellectual property protections on identity interests can be particularly pernicious when doctrines step out of their carefully balanced, historical bounds. This problem has emerged in recent years with the passage of *sui generis* statutory protections that grant strong private property rights to constituent parts of our language. To illustrate this dynamic, consider the word "Olympic." It belongs not to the public, but to the United States Olympic Committee ("USOC"). Under

Church of Scientology's work entitled *NOTs 34*); *Urantia Found. v. Maaherra*, 895 F. Supp. 1329 (D. Ariz. 1995) (rejecting defendant's First Amendment defense to plaintiff's claims of copyright infringement in religious works).

172. See 15 U.S.C. §§ 1114(1)(a), 1125(a) (2006) (proscribing uses in commerce of a mark that is likely to cause consumer confusion with a senior mark); *id.* § 1125(c) (proscribing uses in commerce of a mark that are likely to cause dilution (i.e., blurring or tarnishing) of a famous mark).

173. See 17 U.S.C. §§ 102(a), 106(1)–(6) (2006) (securing certain exclusive rights for the authors of "original works of authorship fixed in any tangible medium of expression").

federal law—specifically, section 110 of the Amateur Sports Act of 1978¹⁷⁴—the USOC possesses the exclusive right to promotional and commercial uses of the word “Olympic” and the related Olympic symbol. As such, the statute grants the USOC the power to enjoin and receive damages from any person who “uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition” the word “Olympic” or “Olympiad.”¹⁷⁵ Thus, more than two millennia after the invention of the word “Olympic” and the inception of the inaugural games in ancient Greece, the federal government propertized the word, and put its use in the hands of a single organization.

The USOC has vigorously enforced its state-granted monopoly in the term “Olympic,” most prominently against a non-profit organization’s attempt to hold the “Gay Olympic Games” in San Francisco.¹⁷⁶ The resulting dispute, which included a lengthy court battle, illustrates the relationship between intellectual property and power, culture, and identity and highlights the importance of considering user interests. In 1987, the Supreme Court upheld the validity of section 110 of the Amateur Sports Act and affirmed the ability of the USOC to enjoin San Francisco Arts & Athletics, Inc., (“SFAA”) from holding the “Gay Olympic Games.”¹⁷⁷ As the Court reasoned, the value of the term “Olympic” “was the product of the USOC’s ‘own talents and energy, the end result of much time, effort, and expense,’ ”¹⁷⁸ and, as such, it was within Congress’s Commerce Clause powers to create a form of intellectual property protection through special legislation that granted the USOC exclusive rights to the word that no ordinary trademark holder would enjoy.¹⁷⁹ Specifically, the protection extended to even non-commercial uses of the word and applied regardless of whether there was a likelihood of consumer confusion, the usual threshold inquiry in trademark analysis.¹⁸⁰ By uphold-

174. 36 U.S.C. § 380(c) (1982) (current version at 36 U.S.C. § 220506(a) (2006)).

175. 36 U.S.C. § 220506(c) (2006).

176. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 525–27 (1987).

177. *Id.* at 528.

178. *Id.* at 533 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977)).

179. *Id.* at 531.

180. *See* 15 U.S.C. §§ 1114(1)(a), 1125(a) (2006) (requiring a likelihood of consumer confusion and use in commerce for a trademark holder to prevail in a federal infringement action).

ing this extraordinary grant of rights to the USOC, the Supreme Court's ruling consecrated Congress's decision to extend to the USOC powers far beyond the traditional ambit of trademark law.¹⁸¹ In short, the decision marked a fundamental expansion in the gamut of intellectual property rights, despite the potential impact on the expressive rights of those wishing to use the term "Olympic" in noncommercial contexts.

By creating a private property right in the word "Olympic," the Court blessed a system of differential access to key terms in the English language. While athletes in the "official" Olympics and other events such as the Special Olympics, Police Olympics, Canine Olympics, and Junior Olympics, which had not been on the receiving end of a suit seeking to enjoin their use of the moniker,¹⁸² could associate themselves with the ultimate emblem of honorable competition, restrained patriotism, and virility, participants in the Gay Games could not. With its ruling, therefore, the Court effectively gave constitutional approval to a heuristic structure that withheld from unpopular or marginalized social groups access to the very words that constitute our language and make up our history. Of course, SFAA was still free to hold an athletic competition featuring gay athletes, but they could not refer to it as an "Olympic." And the consequences of this injunction are significant. "Olympic," after all, is more than just a word; it is a semiotic device imbued with powerful meaning. Simply consider the connotations that such appellations as "the San Francisco Athletic Competition," "the Gay Games," or "Outhletics Fest 1987" generate. Compare those connotations to the singular and distinctive strength of the name "Gay Olympics." Indeed, to this day, there is a stunning absence of openly gay athletes at the Olympics—a particu-

181. While trademark law provides intellectual property protection of certain phrases and even single words, such protection is unavailable for generic terms, *Id.* § 1052(f), and is typically limited to cases where consumer confusion might result. *Id.* § 1066 (allowing denial of a trademark application if the mark so resembles a previously registered mark that it would be likely "to cause confusion or mistake or to deceive"). Of course, the consumer confusion rationale of trademark law has already begun to fade as the courts have expanded the reach of trademark protection in recent years, and as states have granted anti-dilution protections to certain "strong" trademarks. *See, e.g.*, N.Y. Gen. Bus. L. § 360-L (McKinney 2009). Also, Congress has amended the Lanham Act to include special anti-dilution protection for famous marks. *See* Federal Trademark Dilution Act of 1995, 15 U.S.C. § 1125(c).

182. *Int'l Olympic Comm. v. S.F. Arts & Athletics, Inc.*, 789 F.2d 1319, 1321 (9th Cir. 1986) (Kozinski, J., dissenting from denial of petition for rehearing and suggestion for rehearing en banc).

larly surprising fact considering the role of the Games in bringing together individuals of all races, nationalities, creeds, and walks of life. Of the 10,708 athletes at the 2008 Olympics in Beijing, only ten were openly gay, and only one was male.¹⁸³

Moreover, the Supreme Court has recognized the right to use certain words, rather than their synonyms, as fundamental to the exercise of First Amendment rights. In *Cohen v. California*, the Supreme Court overturned the conviction of Paul Robert Cohen for disturbing the peace when he entered a Los Angeles courtroom wearing a jacket bearing the words “Fuck the draft.”¹⁸⁴ Writing for a 5-4 majority, Justice Harlan found Cohen’s actions immunized from liability under the First Amendment.¹⁸⁵ Against arguments that Cohen could have expressed his message using less offensive language, the Court noted:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.¹⁸⁶

With this reasoning, the Court implicitly recognized that uttering “I hate the draft” or “Selective Service sucks” is not the communicative equivalent of declaring “Fuck the draft.” Quite simply, word choice matters. A politically charged exclamation with profanity and its genteel, synonymous analogue may have similar literal translations, but their expressive value differs radically. By forcing Cohen to state his opinion in a particular manner, the verdict—if upheld—would have effectively suppressed content. The Court concluded, “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the

183. Jim Buzinski, *In Beijing Olympics, Only 10 Openly Gay Athletes*, OUTSPORTS.COM (August 5, 2008, 9:56 PM), http://www.outsports.com/os/index2.php?option=com_content&task=view&id=111&pop=1&page.

184. 403 U.S. 15, 16–17 (1971).

185. *Id.* at 26.

186. *Id.*

process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”¹⁸⁷ By the same token, one cannot pretend that the appellations “Outhletics Fest 1987” or “Gay Games” carry the same weight, cultural context, or historical meaning as “Gay Olympics” and, as such, they are not equivalent expressions.

More broadly speaking, the struggle to gain access to the term “Olympic” becomes part and parcel of the gay community’s struggle for civil rights and to gain acceptance in mainstream American society. The gay community’s efforts to use the word “Olympic” could be viewed as a precursor to the community’s battle to use the word “marriage” to describe the union of same-sex couples.¹⁸⁸ In both instances, another word is ostensibly available—be it “Gay Games” or “domestic partnership.” But, the semiotic and political impact of the alternate designations is not the same. If separate is truly seen as inherently unequal,¹⁸⁹ then the dangerous role of intellectual property law in creating differential access to basic social codifiers such as “Olympic” must not be overlooked. In sum, the *SFAA* case provides a salient example of how our intellectual property regime can become a powerful means to regulate and control access to our most enduring cultural symbols, and thereby impact the process of identity expression.

At the same time, use of the word “Gay” in conjunction with the word “Olympic” can also impact identity formation. Besides its semiotic and expressive ritualistic value, control of language can even affect the content of knowledge and thought. In recent decades, the theories of Noam Chomsky and Steven Pinker have dominated academic discourse on linguistics, thereby leading most scholars to support the existence of a universal grammar and language instinct.¹⁹⁰ According to prevailing

187. *Id.*

188. See *N.J. Lawmakers OK Civil Unions, Not Same-Sex Marriage*, CNN.COM (Dec. 14, 2006 6:34 PM), <http://www.cnn.com/2006/POLITICS/12/14/same.sex/index.html> (noting that gay and lesbian advocates decried a decision by the New Jersey legislature that gives gay and lesbian couples the privileges of marriage, but uses the term “civil unions” to describe the partnership).

189. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (finding that “[s]eparate educational facilities are inherently unequal”).

190. See, e.g., Rafaela von Bredow, *Brazil’s Pirahã Tribe: Living without Numbers or Time*, SPIEGEL ONLINE (May 3, 2006), <http://www.spiegel.de/international/spiegel/0,1518,414291,00.html>.

views, human beings all share an innate linguistic palate.¹⁹¹ However, growing awareness about a group of people known as the Pirahã has forced a reconsideration of the size of this inherent palate and revitalized the theories of linguist Benjamin Whorf, bringing his work to the forefront of contemporary discourse. Whorf posited that people are only capable of constructing thoughts for which they possess actual words.¹⁹² In other words, language inextricably affects the nature and content of thought, and a language's lack of words for a concept can preclude the very understanding of that concept by native speakers. As Wittgenstein later elaborated, one only knows that for which one has words.¹⁹³

Residing deep within the Amazon rain forest in central Brazil, the Pirahã are hunter-gatherers who apparently possess no notion of time, no descriptive words, no subordinate clauses, no fixed terms for color, and no numbers in their language.¹⁹⁴ Given the research conducted by linguist Dan Everett and anthropologist Peter Gordon, the very existence of the Pirahã appears to call into question the universalism of such human faculties as the qualification of time and material objects.¹⁹⁵

The Pirahã have a word that roughly means “about one” (“hoi” said with a falling tone) and another word that roughly means “about two” (“hoi” said with a rising tone).¹⁹⁶ After that, however, their language stops counting and they only use a word referring to “many.”¹⁹⁷ The limitations in the Pirahã language, it turns out, appear to reflect a limitation in thought. Although perfectly intelligent in any other respect, the Pirahã

191. See, e.g., NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 25 (1965); STEVEN PINKER, THE LANGUAGE INSTINCT 43 (1994).

192. BENJAMIN WHORF, LANGUAGE, THOUGHT, AND REALITY 65–73 (John B. Carroll ed., 1956).

193. WITTGENSTEIN, *supra* note 2, § 5.6, at 149.

194. von Bredow, *supra* note 190; see also John Colapinto, *The Interpreter: Has a Remote Amazonian Tribe Upended Our Understanding of Language?*, THE NEW YORKER, April 16, 2007, at 120.

195. von Bredow, *supra* note 190.

196. Peter Gordon, *Numerical Cognition Without Words: Evidence from Amazonia*, SCIENCE, Oct. 15, 2004, at 496, 496, available at <http://faculty.tc.columbia.edu/upload/pg328/GordonSciencePub.pdf>.

197. *Id.* As it turns out, their numerical linguistics is somewhat more nuanced than that. Dan Everett now states that the term “hoi” (with a falling tone), which was thought to mean “one,” was more elastic in its meaning and actually referred to “a small size or amount.” Similarly, the term “hoi” (with a rising tone), which was thought to mean “two,” was more elastic in its meaning and actually referred to “a somewhat larger size or amount.” Colapinto, *supra* note 194.

seem unable to learn numeracy. For example, while they showed no difficulty matching groups of one, two, or even three objects, their ability to differentiate between quantities greater than three falls off dramatically. Efforts to improve their counting skills have failed.¹⁹⁸ Thus, they can differentiate quantities for which they have linguistic code (one, two, and many) but not quantities for which they lack a term. The limits of their language, as Wittgenstein asserted, literally determine the limits of their world.

Of course, this analysis does not reference the revitalization of Whorfian theory in order to suggest that depriving a group of the use of the word “Olympics” may lead to its utter inability to conceptualize the notion of a quadrennial international sports competition imbued with the spirit of honor and fair play. But, when intellectual property laws begin to control the use of our language—especially outside of the realm of commerce—we risk creating a class of linguistic haves and have-nots. Symbolic modifiers such as words, after all, mediate one’s identity and perceived relationship with broader society. To see and consume the word “Olympic” in association with a gay event helps attenuate residual prejudices about sport and sexual preference. It can imbue individuals with the sense that one’s sexual orientation is immaterial to one’s ability to attain athletic excellence, thereby impacting identity formation. At the same time, the ability to use the word “Olympics” in association with a gay event sends a powerful expressive message about a particular community’s relationship with a broader international tradition. By restricting the use of linguistic tools such as basic words imbued with cultural meaning, we ultimately limit self-definition and expression, the very hallmarks of personhood development. Intellectual property laws therefore patrol insider-outsider boundaries within mainstream society, and perpetuate social hierarchy by artificially limiting the use of language by non-preferred groups.

198. Colapinto, *supra* note 194; see also Elizabeth Davies, *Unlocking the Secret Sounds of Language: Life Without Time or Numbers*, THE INDEPENDENT, May 6, 2006, <http://www.independent.co.uk/news/science/unlocking-the-secret-sounds-of-language-life-without-time-or-numbers-477061.html> (noting Dan Everett’s failed attempt to teach the Pirahã how to count).

4. Controlling Culture: Copyright Terms and the Propertization of National Heritage

It is well known that, over the past two centuries, copyright terms have expanded dramatically.¹⁹⁹ Currently, of course, copyright subsists in individual authors for the duration of their lifetime plus seventy years.²⁰⁰ As the earlier referenced discussion of the *Eldred v. Ashcroft* case made clear, there are many arguments both for and against this expansion.²⁰¹ However, the growing length of copyright terms has exacerbated the potential clash between copyright protection and the identity interests that individual users might possess in works representing their cultural or national heritage. After all, it can take decades for works to transcend their original narrow purposes and take upon broader meanings to society at large. For example, in an era where copyright protections lasted only fourteen years—as they did under the Copyright Act of 1790²⁰²—a work would typically have long since passed into the public domain before it could make a legitimate claim to representing cultural or national heritage. Admittedly, copyright law has always granted limited monopoly rights over creative content. But with protections for works now lasting more than a century, we increasingly face the dilemma that our cultural and national heritage may be under copyright protection.

Consider the recent lawsuit against pop group Men at Work for the infringement of a music composition that was written more than three-quarters of a century ago. In February, 2010, an Australian court found that the band and their former record label, EMI, had infringed the copyright to one of Australia's most famous and beloved songs, "Kookaburra Sits in the Old Gum Tree."²⁰³ Written in 1934 by teacher Marion Sinclair for use by the Aussie Girl Scouts (known as the Girl Guides), "Kookaburra" quickly rose to prominence as a classic folk melody sung by generations of children huddled by camp

199. *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003) (detailing the history of copyright terms under federal law).

200. 17 U.S.C. § 302(a) (2006).

201. *See supra* Part IB.

202. Under the 1790 Copyright Act, a copyright lasted 14 years and could be extended for another 14 years if and only if the author both survived and applied for a renewal term of an additional 14 years. Copyright Act of 1790, ch.15, § 1, 1 Stat. 124, 124 (1790).

203. Marion Sinclair, *Kookaburra Sits in the Old Gum Tree* (1934).

fires around the world.²⁰⁴ With its sound and references to the antipodean bush, the work has become indelibly associated with Australian national identity.²⁰⁵ In the suit, the court found that Men at Work had improperly lifted a distinctive sixteen-note sequence from “Kookaburra” as a part of the flute riff in their international hit “Down Under”, which was first released in 1981.²⁰⁶ Men at Work songwriter Colin Hay readily admitted that he had not received a license for the use of the “Kookaburra” sequence and acknowledged that the riff was an “unconscious” reference to the folk song.²⁰⁷ After all, the use—whether intentional or unconscious—of the sequence made imminent thematic sense for “Down Under”, which was a comical, lyrical mediation on being “from the land down under.”²⁰⁸ In short, as a contemporary song about Australian national identity, “Down Under” made reference and paid homage to an earlier work about Australian national identity.

Ultimately, the court awarded Sinclair’s successor-in-interest, Larrikin Music Publishing, a relatively meager 5 percent royalty for all revenue generated from the song since 2002, a fraction of the 40–60 percent royalty that it had initially sought.²⁰⁹ Nevertheless, the case cost the defendants a judgment estimated to reach well into the six figures,²¹⁰ providing another powerful monetary disincentive against the unauthorized use of “Kookaburra”. In addition, consider how the case may have come out, especially under American law. First, the plaintiff could have elected to receive statutory damages, thereby allowing it to collect a sizeable judgment against defendants using the work but making no profit at all from it.²¹¹ Secondly,

204. See, e.g., DAN FOX, *WORLD’S GREATEST CHILDREN’S SONGS* 56 (2008) (including “Kookaburra” as one of the world’s eighty-eight most popular and best loved children’s songs).

205. James Madden, *Judge’s Ruling a Win for Men at Work*, THE AUSTRALIAN, July 7, 2010, at 3, available at <http://www.theaustralian.com.au/news/nation/judges-ruling-a-win-for-men-at-work/story-e6frg6nf-1225888695073> (referring to the song as the “country’s de facto national anthem”).

206. James Madden, *Men at Work Avoid Big Royalties Payout over Origins of Land Down Under*, THE AUSTRALIAN, July 6, 2010, available at <http://www.theaustralian.com.au/news/nation/men-at-work-avoid-big-royalties-payout-over-origins-of-hit-song-land-down-under/story-e6frg6nf-1225888404948>.

207. *Id.*

208. Men at Work, *Down Under* (1981).

209. *Id.*

210. *Id.*

211. See 17 U.S.C. § 504(c)(2) (2006) (providing for the assessment of statutory damages of up to \$150,000 per act of willful infringement, regardless of actual damages or profit stemming from the acts of the defendant).

an injunction could have been issued, thereby interdicting use of the work altogether by anyone unwilling to pay the sampling-license rate unilaterally determined by the plaintiff (if the plaintiff chose to license at all).²¹² Either of these results could make the use of a key part of Australia's national heritage either prohibitively expensive or outright impermissible, thereby suppressing expressive, identity-driven uses of "Kookaburra" in the process. As Men at Work member Greg Ham stated, the flute line was added to "Down Under" to "try to inject some Australian flavour into the song."²¹³ The exertion of restrictive exclusive rights to the "Kookaburra" sound would fundamentally impact the ability of individuals and groups to express cultural and national identity interests.

The consequences of propertizing and sacralizing a musical composition synonymous with Antipodean identity—one likely

212. Historically, there would be little question that, following a determination of liability, a court would enjoin further sales of an infringing product, as courts used to routinely grant permanent injunctions to prevailing plaintiffs in intellectual property cases, absent exceptional circumstances. *See, e.g.,* Am. Metro. Enters. of N.Y.C., Inc. v. Warner Bros. Records, Inc., 389 F.2d 903, 905 (2d Cir. 1968) ("A copyright holder in the ordinary case may be presumed to suffer irreparable harm when his right to the exclusive use of the copyrighted material is invaded."). However, in recent years, the Supreme Court has seemingly mandated a dramatic shift from this general rule. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (explicitly rejecting adoption of a "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances"); *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001) (finding in dicta that, under the Copyright Act, "it hardly follows from today's decision [finding infringement] that an injunction against [infringing use of the copyrighted works in question] . . . must issue"). By allowing judges the discretion to transform patent, copyright, and trademark protection from property rights to a liability regime, the Court reasserted the importance of a critical element sometimes overlooked in the adversarial setting: the public interest. *eBay Inc.*, 547 U.S. at 391. Courts therefore possess the option to order damages but allow an act of infringement to continue unabated. Noted Justice Kennedy in his *eBay* concurrence:

When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest. In addition injunctive relief may have different consequences for the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times.

eBay, 547 U.S. at 396–97 (Kennedy, J., concurring). Nevertheless, injunctive relief still generally follows an infringement verdict.

213. Kim Arlington, *Infringement Down Under*, THE SYDNEY MORNING HERALD, Feb. 10, 2010, <http://www.smh.com.au/news/entertainment/music/men-at-works-down-under-ripped-off-kookaburra-court/2010/02/04/1265151932344.html>.

better known abroad than even Australia's own national anthem—are particularly troubling when one considers the likely origins of the “Kookaburra” riff itself. To some observers, the famous sequence is actually onomatopoeic and simply captures the famously good-natured, mirthful sound of the kookaburra—a bird indigenous to Australia and a veritable national symbol.²¹⁴ In a sense, therefore, the “Kookaburra” riff reflects nothing more than the sound of nature—specifically, that of the Australian bush. That sound is arguably a part of the country's natural heritage and not properly subject to propertization.

All told, our four case studies have illustrated how intellectual property laws regulate the individual consumption and customization of cultural, religious, and political symbols, thereby impacting the formation and expression of nationalistic, spiritual, and sexual identities. This is especially the case in a world where consumption is driven increasingly by wants rather than needs, and product value is driven less by bare utility than communicative status.²¹⁵ This observation contradicts the general thrust of personhood theories of copyright, which have historically rationalized the extension of moral rights for artists and justified the expansion of authorial control over creative works. As such, the personhood interests of copyright users are an important factor that should be weighed in any framework for assigning and evaluating copyright interests.

Take the example of “Kookaburra.” The song's continued protection is a direct result of term extensions that applied retroactively to existing works.²¹⁶ Such extensions are difficult to rationalize on utilitarian grounds since, after all, the works are already created.²¹⁷ There is also little in the way of an author's personhood interests to protect. As Justice Breyer points out, for works created in the 1920s and 1930s, it is likely that “the copyright holder making the decision is not the work's creator,

214. Notes Matthew Westwood, an arts journalist in Australia, “It's a very typical Australian sound—a bush sound. That's why I think it's really mean-spirited to say, ‘Hey, this is theft,’ if it's something that comes from nature.” Neda Ulaby, *A Kookaburra Causes Trouble 'Down Under'*, NPR MUSIC (Dec. 1, 2009), <http://www.npr.org/templates/story/story.php?storyId=120984958>.

215. See *supra* note 112 and accompanying text.

216. See, e.g., Australia-United States Free Trade Agreement, U.S.-Aus., art. 17, May 18, 2004, 118 Stat. 919 (granting an additional twenty-year term to Australian copyrights).

217. As Justice Breyer has rhetorically asked: “How will extension help today's Noah Webster create new works 50 years after his death?” *Eldred v. Ashcroft*, 537 U.S. 186, 255 (2003) (Breyer, J., dissenting).

but, say, a corporation or a great-grandchild whom the work's creator never knew."²¹⁸ This is precisely the case with "Kookaburra," whose author is long dead and whose rights reside in a corporation dedicated to litigation as a means of generating revenue. Whatever labor-desert justifications remain for the continued protection of "Kookaburra" some three-quarters of a century after its publication, they must be balanced against the weighty personhood interests that users possess in the work.

As our examples have shown, personhood interests may be served just as well through *consumption*, rather than creation, of protected works. The vindication of these interests can take the form of spiritual exploration through the invocation of religious homilies; expressive perfection through referential, reverential, and disrespectful uses of one's national flag or works of cultural heritage; and symbolic defiance of traditional notions of virility and masculinity through the convocation of non-traditional athletic games. By dictating the scope of allowable uses of our leading semiotic signposts, and by determining which groups possess such use rights, intellectual property plays a profound role in mediating identity politics. And, outside of the existence of limited statutory exemptions and last-minute salvation from the notoriously ambiguous fair use doctrine,²¹⁹ present law provides insufficient recognition and protection of such user-based interests.

III. ACCESS AND THE ACTUALIZATION OF IDENTITY INTERESTS: THE UNAUTHORIZED POSSESSION AND PRIVATE USE OF COPYRIGHTED WORKS

As we have seen, intellectual property laws impact the formation of identity interests and their ultimate expression. However, in order to realize these identity interests, users require access to cultural content. Indeed, access is the *sine qua non* of the manifestation of such identity interests. Without access, neither formative nor expressive uses of intellectual property are possible. Historically, one vehicle to safeguard such access has stemmed from the relatively wide breadth of immunity that even the unauthorized possession and private use of copyrighted works enjoyed from liability. In this way, our copyright regime tacitly protected the personhood interests

218. *Id.* at 251.

219. 17 U.S.C. § 107 (2006).

of users by supporting the dissemination and preservation of knowledge and access to creative content imbued with ontological meaning. Yet, as we shall see, both legal and technological changes now threaten the ambit of this access as more activities have come under the scope of civil, and even criminal, liability.

A. *Access to Knowledge and the Importance of Private Use Rights*

To illustrate the role of possession and private use of unauthorized copies of creative work in fostering identity formation and personhood development, we look to examples from both antiquity and the twenty-first century. Consider the Royal Library, which helped make the ancient city of Alexandria the epicenter of learning and scholarship in the pre-modern world.²²⁰ At the height of its glory, the Library housed almost half-a-million papyrus scrolls.²²¹ As it turns out, the law combined with a thorough disrespect for any notion of copyright combined to make the very existence of the Library possible.²²² Alexandria was, of course, a key hub for commerce that brought merchants from around the world to its shores. When these seafarers came to the metropolis, they brought with them reading materials—literature, philosophical tracts, maps, and scientific treatises. The Library quickly grew in size to achieve its legendary status.²²³ Interestingly enough, the fabled Alexandria collection may well have been gathered through outright piracy. According to legend, by decree of Ptolemy III of Egypt, all individuals visiting Alexandria were required to deposit their reading materials with the Library, so that copies could be made.²²⁴ It was this act of infringement²²⁵—the

220. STEVEN ROGER FISCHER, *A HISTORY OF READING* 59 (2003).

221. *Id.* at 58.

222. *Id.* (“Every ship that put in at Alexandria, one of the world’s major ports, had to hand over for copying any scrolls it was carrying. Greek Egypt’s ambassadors borrowed scrolls from other Greek libraries for copying. . . . Many Greeks gave scrolls to the Library, while others lent theirs to be copied. Some fraudsters even sold Library officials apocryphal treatises by ‘Aristotle’ (only centuries later proved to be forgeries).”).

223. *Id.*

224. Barbara Krasner-Khait, *Survivor: The History of the Library*, *HISTORY MAGAZINE* (Oct.–Nov. 2001), <http://www.history-magazine.com/libraries.html>. Legend has it that, in many cases, the original was kept and it was a mere copy that was returned. *Id.*

wholesale reproduction of a work without permission of the author or publisher, sanctioned (and even dictated) by law—that allowed the creation of one of the great Meccas of education in the ancient world.²²⁶ The private use of these unauthorized copies fostered learning and the dissemination of knowledge so critical to both personal development and artistic and scientific progress. Indeed, without the extensive collection of learning housed at the Library, the scholarship that emerged from the institution would not have been possible.²²⁷

Although the tale of Ptolemy's decree may be apocryphal, housing repositories of knowledge culled without the blessing of rights holders remains a valuable and even lofty goal in the modern world. In the first instance, modern libraries (and used book stores) only exist legally because of the exception to copyright liability stemming from the first sale doctrine, which allows purchasers of books and other copyrighted works to dispose of those copies as they see fit (and without permission of a copyright holder)—whether that means reselling them, giving them away or lending them out.²²⁸ Otherwise, a library could implicate a copyright holder's exclusive right “to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”²²⁹

Unfortunately for consumers, the first sale doctrine is coming under threat as content creators have attempted to circumvent its application by characterizing distribution of their product to purchasers as licenses rather than outright sales.²³⁰ Accordingly, creators argue that purchasers are never “the

225. Here, of course, we use the word “infringement” as it is understood under modern law.

226. James Burke recounts this story in the television series *Connections. Connections: Death in the Morning* (BBC 1978).

227. Krasner-Khait, *supra* note 224.

228. Section 109(a) of the Copyright Act, 17 U.S.C. § 109(a) (2006), codifies the first sale doctrine, which was first enunciated by the Supreme Court in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908) (holding that “the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract”). Notably, section 109 exempts computer programs and sound recordings from certain aspects of the first sale doctrine. 17 U.S.C. § 109(b).

229. 17 U.S.C. § 106(3).

230. See Henry Sprott Long III, Note, *Reconsidering the “Balance” of the “Digital First Sale” Debate: Re-Examining the Case for a Statutory Digital First Sale Doctrine to Facilitate Second-Hand Digital Media Markets*, 59 ALA. L. REV. 1183, 1191 (2008) (noting the software industry's prevalent use of “click-wrap” licenses).

owner of a particular copy . . . lawfully made,”²³¹ who would have any rights under the first sale doctrine.²³² As a consequence, purchasers are subject to restrictive terms-of-use that waive rights previously secured under the first sale doctrine, including the ability to dispose of one’s copy of a protected work as one pleases. Courts have frequently upheld such terms, despite arguments that they are properly pre-empted by the federal Copyright Act and the Constitution’s Copyright and Supremacy Clauses.²³³ Additionally, even in an era of relative wealth, many communities and even countries simply cannot afford the high costs of acquiring initial copies of copyrighted content to sustain a library. In fact, to the surprise of modern observers, early American copyright law even acknowledged this problem directly. During the Articles of Confederation era, there was no federal copyright protection.²³⁴ Instead, states possessed their own copyright laws.²³⁵ And while these statutes generally resembled the eventual protection regime adopted under the Constitution and the federal Copyright Act of 1790, many differed in at least one significant way. Several states—including New York, North Carolina, South Carolina, and Georgia—had statutes that explicitly recognized the rights of users to “sufficient” quantities of books offered at “reasonable” prices²³⁶—a far cry from public policy today.

Public access to copyrighted works, including their possession and private use, is of paramount value, especially when it can have life-saving consequences. Indeed, access to copyrighted works can advance not only personal development but also personal preservation. Consider the example of copyrighted medical literature. In a study published by the Commission on Intellectual Property Rights, Alan Story found that the required payment of copyright royalties has significantly

231. 17 U.S.C. § 109(a).

232. See Long, *supra* note 230, at 1191.

233. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453–55 (7th Cir. 1996) (upholding the validity and enforceability of a “shrink wrap license” on a CD-ROM despite claims that the license was pre-empted under the Copyright Act).

234. See Joshua Crum, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 BYU L. REV. 943, 949–50 (2008).

235. *Id.* at 949 (noting that “[u]pon gaining independence from Britain, most states instituted their own copyright schemes under the Articles of Confederation”).

236. Gillian K. Hadfield, *The Economics of Copyright: A Historical Perspective*, in *THE ECONOMICS OF INTELLECTUAL PROPERTY* 129, 138–39 (R. Towse & R.W. Holzhauser, eds. 2002).

inhibited the distribution of copyrighted materials about HIV and AIDS to students and patients in South Africa.²³⁷ As a result, educational efforts aimed at stemming the spread of infection and assisting affected individuals have faltered, costing lives in the process.²³⁸ Meanwhile, the expense of acquiring translation rights has meant that many books that could advance the dissemination of knowledge in developing countries remain available only in major Western languages.²³⁹ As Story notes, this problem is particularly serious in many African countries characterized by linguistic heterogeneity.²⁴⁰ In these particular instances, unauthorized pure copying can save lives.

Unauthorized copying can also help preserve knowledge for future generations, even in the digital age. Admittedly, one might speculate that with easy digital reproduction and mass dissemination, we enjoy a surfeit of copies of important works in the internet era. However, this is not necessarily the case, as long-term preservation of digital copies of works presents a number of challenges. Indeed, the archiving challenges that plague digital content have received scant attention. Each time a new digital version of a work supplants an old one, the old version is gone forever unless an independent copy of it is made before the revision. And while rights-holders may archive works themselves, they are less than reliable forces for doing so. For example, if the original version of a document reveals something embarrassing, or information against rights-holders' interests, they have a strong incentive to avoid archiving. As a result, there is a strong need for independent archiving of digital works²⁴¹—something that cannot always be accomplished without potentially running afoul of copyright laws. Indeed, archiving digital content can play a critical role in historical preservation and knowledge dissemination.

In addition, archiving has grown more, rather than less, necessary in the digital age. Surprisingly, digital media is not as durable as traditional media for a variety of reasons. First,

237. ALAN STORY, STUDY ON INTELLECTUAL PROPERTY RIGHTS, THE INTERNET, AND COPYRIGHT 48 (2002).

238. *See id.*

239. *Id.*

240. *Id.*

241. For example, the Library of Congress has instituted a "Preserving Creative America" initiative designed to archive creative content in digital form. *Digital Preservation Program Makes Awards to Preserve American Creative Works*, THE LIBRARY OF CONGRESS (Aug. 3, 2007), <http://www.loc.gov/today/pr/2007/07-156.html>.

the vessels that house digital media are often more corruptible than their analog equivalents. While a book may survive several thousand years, one could hardly say the same about a CD, which can be ruined with a simple scratch. Second, even if its packaging remains viable, digital media usually relies upon a particular machine to grant access to it. For example, during the brief transition point between old 3.5 inch floppy disks, which typically held up to 1.44 megabytes, and rewritable CDs and DVDs, which could hold several gigabytes, Zip drives emerged as the storage platform of choice during the late 1990s.²⁴² In order to read one, however, not only must the Zip disk be in good shape, but a working Zip-drive reader is necessary to access it. Only a decade after their heyday, Zip-drive readers are quickly fading into obscurity. Moreover, unlike traditional media, the degradation of digital media is often not visibly evident. Paper deteriorates before our eyes; film emits a vinegar smell when it begins to rot; but the integrity of digital media is more difficult to ascertain. Thus, copyright provisions that prevent the effective preservation of creative works in digital form can impede access to knowledge and creative content for future generations.

B. The Historical Protection of Unauthorized Possession and Private Use

Historically, our copyright jurisprudence has provided both implicit and explicit acknowledgment of user interests in the unauthorized possession and private use of copyrighted works. But these protections are coming under fire as they lose immunity from copyright liability. To illustrate this point, I begin by examining the statutory and juridical framework that has traditionally guarded user rights in the unauthorized possession and private use of copyrighted works. In particular, I locate strong tacit support for such rights in the historical treatment of publication under the Copyright Act, the specific absence of certain exclusive rights from section 106 of the Act, and the surprisingly relevant First Amendment jurisprudence

242. According to Iomega, the company that invented the Zip drive, “On March 24, 1995, Iomega shipped the first Zip drive. . . . The Zip drive became one of the fastest selling, most successful peripherals in the history of computing. . . . [T]he Zip product line generate[d] \$1.2 billion in sales annually from 1997 through 1999.” *Iomega: 25 Years of Storage Technology Leadership*, IOMEGA, <http://www.iomega.com/25years/index.html> (last visited Sept. 15, 2010).

in the area of obscenity. I then examine the ways in which both technological and legal changes are rapidly undermining these former protections.

1. User Rights and the Act of Publication

The historical role that publication has played in determining the scope of an author's monopoly speaks to the implicit user interests acknowledged in our copyright regime. Prior to publication, the personhood interests in a work of intellectual property lie chiefly with the author. After all, the work is an extension of the author, who has decided not to disseminate the work (yet). At this point, the personhood interests of the author are at their apex, while the personhood interests of users are at their nadir. However, this balance changes upon publication. Publication, especially in the digital age, can be tantamount to mass dissemination. Now, the author is not the only person to interact with the work; instead, millions of individuals can as well (for the right price). As consumers of the intellectual property mingle with the work, they also begin to acquire identity interests in it, especially as it takes on semiotic value. In a sense, these user interests are tacitly acknowledged by the law, which actually reduces the monopolistic control a creator has on her intellectual output upon publication.

It is often stated that federal copyright protection serves to encourage dissemination of creative works: in exchange for the publication of a work, an author receives federal copyright protection—a government-granted monopoly entitling an author to a bundle of exclusive exploitation rights.²⁴³ Upon cursory examination, it would appear that such a system would incentivize mass distribution by enhancing an author's intellectual property rights upon the act of publication. After all, for most of American history (i.e., until the passage of the 1976 Copyright Act), unpublished works were generally not protected under federal law.²⁴⁴

243. See 17 U.S.C. § 106 (2006) (setting out the exclusive rights to which a copyright holder is entitled under federal law).

244. Under the 1909 Copyright Act, and the 1790 and 1831 Acts that preceded it, publication was a prerequisite for federal copyright protection. See Paul Goldstein, *Federal System Ordering of the Copyright Interest*, 69 COLUM. L. REV. 49, 51 (1969) (writing, prior to the enactment of the 1976 Copyright Act, that “[p]ublication defines . . . not only the line separating common law from statutory copyright but, as well, the traditional border between state and federal competence over the copyright interest”).

However, in exchange for the right to profit through mass dissemination of one's work, an author typically *loses* certain rights upon the act of publication. Among other things, a work becomes subject to greater fair use rights²⁴⁵ and to certain compulsory licenses.²⁴⁶ Further, until the passage of the 1976 Copyright Act, publication actually *reduced* the duration of copyright protection that an author enjoyed. Although unpublished works did not receive *federal* copyright protection, they did enjoy another form of protection under the aegis of state law. Colloquially referred to as "common law" copyrights, these state laws typically granted authors exclusive rights to their unpublished works.²⁴⁷ However, unlike federal protections, "common law" copyright lasted forever. Take an author who created a work in 1975. So long as she did not publish the work, she enjoyed a "common law" copyright through which she exercised the exclusive right of reproduction in perpetuity.²⁴⁸ However, if she published the work, her "common law" copyright morphed into a federal copyright (so long as certain formalities were observed), and she secured the exclusive right of reproduction for 56 years, after which the work would fall into the public domain.²⁴⁹ Thus, the act of publication diminished the level of effective property protection a work received. Of course, this small disincentive against publication did not override the overwhelming reason for publication: the ability to profit through mass reproduction and distribution.

Thus, for most of American history, the act of publication has resulted in an effective shortening of a work's copyright duration from perpetuity to a fixed term. After all, by deciding

245. *Harper & Row v. Nation Enters.*, 471 U.S. 539, 554 (1985) (holding that there is a heavy presumption against fair use of unpublished works).

246. *See, e.g.*, 17 U.S.C. § 115 (2006) (limiting the compulsory mechanical license to only published musical compositions).

247. 1 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 2.02 (1978); *see, e.g.*, Cal. Civil Code § 980 (Deering 1941) ("The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession.") (amended 1947).

248. This is, of course, no longer the case. With the operation of section 303 of the Copyright Act, common law copyright protection for works that had never been published or registered was eliminated as of January 1, 2003. 17 U.S.C. § 303 (2006).

249. Copyright Act of 1909, § 23, 35 Stat. 1075 (1909) (extending federal copyright protection to an initial term of twenty-eight years with a one-time renewal term of twenty-eight years, dating from the first publication with proper notice).

to profit from a copyrighted work, the creator is giving some part of that work to the world. Consequently, although the framers chose to draft a constitutional clause empowering Congress to grant copyrights for “a limited time,” this federal copyright regime existed compatibly with a common law system of perpetual copyrights for unpublished works that endured for more than two centuries.

As a result, our copyright regime has tacitly recognized the non-authorial interests triggered upon a work’s publication through the reduced term of protection given published works vis-à-vis unpublished works (at least prior to 2003), the greater fair use rights enjoyed for published works, and the availability of certain compulsory licenses upon publication. Admittedly, the nature of these non-authorial interests is ambiguous. On one hand, we could argue that limiting the scope of protection given to published works serves primarily to bolster user rights to transform existing works so that they might advance progress in the arts—the chief goal of the copyright regime, as dictated by the Constitution. On the other hand, these non-authorial rights also encompass the right to reproduce and make simple use of works in order to advance First Amendment interests, disseminate knowledge, facilitate learning, and advance identity formation. Indeed, when considered in combination with other limitations in the copyright regime, the implicit recognition given to non-transformative user interests becomes clear.

2. What Copyright Does Not Protect: Learning from the Limits on Exclusive Rights

Consider section 106,²⁵⁰ arguably the most important section of the Copyright Act. The provision defines the specific exclusive rights to which copyright holders are entitled. Section 106’s list of exclusive rights is revealing, not just for what it protects, but for what it does not. In other words, the negative space of the Copyright Act provides a basis for greater recognition of user interests. Specifically, the law tacitly acknowledges the importance of both transformative manipulations of copyrighted works and non-critical uses. It does so through one of its more significant, albeit less appreciated, limitations: the

250. 17 U.S.C. § 106 (2006).

absence of penalties against possession or private use of infringing works.

As the Supreme Court has noted:

The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead . . . the Act enumerates several “rights” that are made “exclusive” to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these “exclusive rights,” he infringes the copyright. If he puts the work to a use not enumerated . . . he does not infringe.²⁵¹

For example, the Act only grants owners the exclusive right to perform a protected work publicly.²⁵² As such, performing a copyrighted musical composition in the privacy of one’s shower does not constitute an act of infringement.²⁵³ Section 106 proscribes unauthorized reproduction, adaptation, distribution, public performance, or public display of a copyright work.²⁵⁴ However, unauthorized possession and private use are conspicuously missing from this list.²⁵⁵ As a result, by possessing an illegal copy of a copyrighted work, one does not violate any rights secured under federal law for the copyright holder. Bootleggers (of the recording variety) may therefore face legal sanctions for recording and distributing unauthorized concert recordings; but a mere possessor, private user, or even a purchaser²⁵⁶ incurs no such liability.

This tack differs significantly from the law of black market goods or of property in general, where wrongful possession is not just sanctionable, but criminal. Knowingly housing a stolen automobile is a felony.²⁵⁷ Meanwhile, it is not a crime to

251. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393–95 (1968) (footnotes omitted).

252. 17 U.S.C. § 106(4) (limiting the performance right to those performances that are public).

253. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975).

254. *See* 17 U.S.C. § 106(1)–(6).

255. *See id.*

256. Arguably, ever expanding secondary infringement might someday cause a court to find that knowing payment for an illegal copy of a copyrighted work constitutes sufficient material contribution to infringement to support a finding of liability against a purchaser (but not mere possessor) of an unauthorized copy. John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 547 (2007).

257. *See, e.g.*, OR. REV. STAT. § 819.300 (2009) (“A person commits the offense of possession of a stolen vehicle if the person possesses any vehicle which the per-

merely sell illicit narcotics; it is also a crime (though a lesser one) to purchase or possess them.²⁵⁸ As a result, it is fair to wonder why we have such copyright exceptionalism in the regulation of possession. One might find the answer in an unusual place: First Amendment jurisprudence on the law of obscenity.

3. Constitutionalizing Rights to Authorized *and* Unauthorized Possession and Private Use: Copyright, Obscenity, and the First Amendment

Although the Supreme Court has allowed the criminalization of sexually explicit materials deemed obscene under the reigning *Miller* standard,²⁵⁹ it has carved a notable safe harbor for those who simply possess, but do not produce or distribute, such materials. In *Stanley v. Georgia*, the Supreme Court un-animously held that the government cannot punish the private possession of obscenity in the home.²⁶⁰ In part, this result was justified by substantive due process norms protecting the right of privacy, especially in the home.²⁶¹ On another level, however, such a result also reflects a hesitation to interfere with the right of individuals to possess expressive works, as protected by

son knows or has reason to believe has been stolen. . . . The offense described in this section, possession of a stolen vehicle, is a Class C felony.”).

258. See, e.g., CONN. GEN. STAT. § 21a-279(a)(2009) (stating that those convicted of a first-time offense of possession of narcotics can face up to seven years imprisonment and up to a \$50,000 fine).

259. *Miller v. California*, 413 U.S. 15, 19–20 (1973). Under *Miller*, a work cannot be deemed obscene and, therefore, banned by the government unless a trier of fact determines that:

(a) . . . “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (internal citations omitted).

260. 394 U.S. 557, 568 (1969). Importantly, the Supreme Court has refused to extend the *Stanley* exception to child pornography. As a result, punishing the creation, distribution, *and* possession of child pornography is constitutionally permissible. See *New York v. Ferber*, 458 U.S. 747, 765 (1982) (rejecting a First Amendment challenge to a law proscribing child pornography).

261. *Stanley*, 394 U.S. at 564 (“[F]undamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”).

the First Amendment, no matter how base and repulsive they might be according to local community standards.²⁶²

As with obscenity jurisprudence, the law of copyright is considered an exception to the First Amendment and its general interdiction against government abridgement of speech. Despite its status as speech, obscenity can be banned outright because of its purported lack of socially redeeming value.²⁶³ And, despite its status as speech, copyrighted works can be protected from unauthorized use because they are reified as a species of property; according to the Supreme Court, while an individual may have a right to make his own speech, he does not necessarily have the right to make the speech of others.²⁶⁴ Yet if government cannot outlaw the private possession of obscenity without running afoul of the constitutional right to freedom of speech and expression, one could surmise that a similar constitutional limitation would prevent punishment of the private possession of infringing works. Indeed, the closing words of Justice Marshall's opinion in *Stanley* could well apply to copyrighted works as well as obscene works: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."²⁶⁵

The Court's holding is particularly noteworthy when one considers that the materials at issue have been deemed legally obscene and, therefore, judged to lack "serious literary, artistic, political, or scientific value."²⁶⁶ Nevertheless, the Court goes out of its way in the *Stanley* decision to protect the affirmative right of individuals to access such materials—not just to limit the power of government to enter the home but to also allow for the personal development of individuals, no matter how at odds that development may seem with societal values. As the Court explained, legalizing the private possession of obscene materials, which could neither be produced nor distributed under the law, was necessary to protect "the right [of an individual] to

262. *Id.* ("[T]he Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth is fundamental to our free society.") (internal citation omitted).

263. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 485 (1954) ("[O]bscenity is not within the area of constitutionally protected speech or press."), *abrogated on other grounds by* *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), *as recognized in* *Marks v. United States*, 430 U.S. 188, 193 (1977).

264. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

265. *Stanley*, 394 U.S. at 565.

266. *Miller v. California*, 413 U.S. 15, 24 (1973).

read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.”²⁶⁷ By the same token, the possession and private use of copyrighted works—whether authorized or infringing—advances expressive interests and personal development. This is particularly true since the universe of copyrighted materials (contrary, apparently, to the universe of obscenity) includes many works of serious literary, artistic, political, or scientific value.

C. The Growing Threat to Possession and Private Use Rights

All told, the right to unauthorized possession and use of copyrighted works is not simply limited to such specific statutory exemptions as the fair use and first sale doctrines. Rather, the Copyright Act’s treatment of publication, the delimited nature of its exclusive rights grant, and the development of First Amendment jurisprudence also provide firm bases for greater recognition of such possession and usage rights. However, in recent years, technological and legal developments have enabled the penumbra of copyright liability to cast a shadow on previously immunized activities. With the concept of the author as authority growing more powerful, copyright law has increasingly invaded the private sphere, extending into our living rooms to mediate how we interact with intellectual property in myriad ways. In particular, the development of ancillary copyright doctrines and the nature of digital distribution have combined to make unauthorized possession and private use of copyrighted works the subject of liability, despite their specific exclusion from section 106’s enumeration of exclusive rights. In the process, we threaten the non-critical utilization of copyrighted works for the advancement of personal development.

1. Secondary Liability Doctrine Unbound

First, the expansion of secondary liability doctrines, especially the contributory variety, has created a backdoor mechanism for rendering the purchase and possession of infringing goods potentially actionable. Secondary liability doctrines allow a plaintiff to pursue infringement claims, under certain cir-

267. *Stanley*, 394 U.S. at 565.

cumstances, against parties who facilitate the violation of a copyright holder's exclusive rights, even though those parties do not directly infringe those rights themselves. Such secondary liability theories are a powerful tool for the vindication of copyright holders' interests, especially because direct infringers can be difficult to track, immune from personal jurisdiction, or impractical to pursue since they may be judgment-proof.

Over the past few decades, the scope of secondary liability theory has increased markedly.²⁶⁸ Oddly enough, there is no explicit provision for secondary liability in the Copyright Act. In fact, there is almost no legislative acknowledgment of such causes of action,²⁶⁹ save a fleeting comment in the Digital Millennium Copyright Act²⁷⁰ and an oblique reference to "authorizing" infringement in a House Report for the 1976 Copyright Act.²⁷¹ Nevertheless, courts have recognized the availability of both common law theories of secondary liability—contributory and vicarious—in assisting content creators in their legal battles against facilitators of intellectual property infringement.²⁷²

268. Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1365 (2006).

269. See Jay Dratler, Jr., *Common-Sense (Federal) Common Law Adrift in a Statutory Sea, or Why Grokster was a Unanimous Decision*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 413, 419 (2006).

270. See 17 U.S.C. § 1201(c)(2) (2006) ("Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.").

271. See H.R. REP. No. 94-1476, at 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674 ("The exclusive rights accorded to a copyright owner under section 106 are 'to do and to authorize' any of the activities specified in the five numbered clauses. Use of the phrase 'to authorize' is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.").

272. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982), represents the seminal case in secondary trademark liability jurisprudence. In *Ives*, the Supreme Court confirmed the application of secondary liability principles to trademark law by holding that a trademark owner could hold the manufacturer of a generic drug contributorily liable for the actions of pharmacists. *Id.* at 853–54. While not elaborating on the justification for importing tort principles into the federal trademark regime, the Court affirmed that liability for trademark infringement can extend past those who actually "use" a protected mark by imposing indirect liability on *Inwood*. *Id.* at 853–54. Similarly, in *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911), the Supreme Court affirmed the application of secondary liability doctrines to copyright infringement. The Court held that the producer of an unauthorized film dramatization of the copyrighted book *Ben Hur* was liable for his sale of the film to middlemen who arranged for the film's commercial exhibition. *Id.* The Court explained that although the producer did not take part

Both secondary liability theories require an underlying act of direct infringement.²⁷³ Contributory liability attaches when proof exists of (1) the defendant's knowledge of the infringement, and (2) the defendant's material contribution to the infringement.²⁷⁴ Vicarious liability, as an outgrowth of the *respondeat superior* doctrine, requires: (1) the right and ability of the defendant to control the actions of the infringer, and (2) a direct financial benefit to the defendant from the infringement.²⁷⁵

As these doctrines have expanded, they have threatened to bring the possession and private use of infringing works within the scope of civil liability. Courts have read the material-contribution element of contributory liability increasingly broadly.²⁷⁶ Indeed, a person's or entity's role in establishing the situs for an infringing activity may suffice as a cognizable material contribution for which liability can attach.²⁷⁷ For example, a commercial operator of sound recording or video duplication facilities may be held liable for the infringing acts of its customers even if the customers bring in the copyrighted materials that they improperly copy.²⁷⁸ Similarly, a swap-meet landlord can be held liable for contributory infringement based on the actions of vendors on its property.²⁷⁹ As the Ninth Circuit has explicitly held, the mere provision of "the site and facilities

in the final act of infringement—the exhibition of the infringing film to paying customers—his contribution was sufficient to make him secondarily liable. *Id.* Although *Ives* and *Kalem Co.* involved contributory liability claims, the decisions imply that both types of secondary liability theories—contributory and vicarious—are available to copyright and trademark plaintiffs.

273. *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794–95, 800 (9th Cir. 2007).

274. *See Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

275. *See id.*

276. For example, the Ninth Circuit has suggested a more lax standard for considering whether a third party has materially contributed to an act of infringement "in the context of cyberspace," since "services or products that facilitate access to websites throughout the world can significantly magnify the effects of otherwise immaterial infringing activities." *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 728 (9th Cir. 2007); *see also* Mark Bartholomew, *Cops, Robbers, and Search Engines: The Questionable Role of Criminal Law in Contributory Infringement Doctrine*, 2009 B.Y.U. L. REV. 783, 792 (2009).

277. *See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

278. *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335, 336–37 (S.D.N.Y. 1984).

279. *Fonovisa*, 76 F.3d at 264 (finding contributory liability where defendants provided "space, utilities, parking, advertising, plumbing, and customers" to direct infringers).

for known infringing activity is sufficient to establish contributory liability.”²⁸⁰ Or, in a more technologically advanced setting, an operator of a computer bulletin board service that automatically distributed all bulletin board postings, infringing or not, to service subscribers faced contributory liability for a subscriber’s posting of infringing work,²⁸¹ a ruling that precipitated congressional adoption of the Digital Millennium Copyright Act’s safe-harbor provisions that protect Internet Service Providers from contributory liability in such situations.²⁸² Indeed, the Supreme Court’s most recent consideration of secondary liability explicitly held that “intentionally inducing or encouraging direct infringement,” regardless of one’s actual knowledge of specific infringing acts, could be a sufficient basis for liability.²⁸³

Based on these holdings, it is not much of a stretch to argue that providing infringers with a profit motivation for their activities could constitute a material contribution towards their acts of infringement. For example, in 2007, in a case of first impression, a Ninth Circuit panel narrowly rejected an attempt by a content owner to hold Visa and other payment services secondarily liable for processing credit card payments for websites that infringed the content owner’s copyrights.²⁸⁴ However, the court did so by only a single vote and the opinion featured a vigorous dissent by Judge Alex Kozinski,²⁸⁵ who asserted that Visa could be found liable both for contributory liability—for knowingly processing financial payments that substantially assist users in accessing and downloading infringing content²⁸⁶—and for vicarious liability—for undoubtedly profiting from the infringing activities of websites delivering stolen content by taking a cut of virtually every economic transaction on those websites, and by failing to exercise their right and ability to limit the infringing activity.²⁸⁷ Moreover, although the *Visa* majority found that the automated processing of payments meant that the defendants did not “affirmatively pro-

280. *Id.*

281. *Religious Tech. Ctr. v. Netcom On-line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

282. *See* 17 U.S.C. § 512 (2006).

283. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

284. *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788 (9th Cir. 2007).

285. *Id.* at 810–25.

286. *Id.* at 811–16.

287. *Id.* at 816–22.

mote each product that their cards are used to purchase,”²⁸⁸ the same may not be true for the direct act of purchasing an infringing good, which could very well incur contributory, if not vicarious, liability.

Currently, for example, the major publishers are systematically pursuing litigation against copy shops around the country that photocopy course packets for use in college classes.²⁸⁹ According to the publishers, the preparation of these course packets constitutes a willful act of infringement for which there is no fair-use defense.²⁹⁰ The publishers have even enjoyed some success in their fight, including the high-profile decision in *Michigan Document Services*, where an en banc panel of the Sixth Circuit reversed a prior finding of fair use and held a copy shop preparing course packets at the University of Michigan liable for infringement.²⁹¹ To date, the publishers have not pursued litigation against those who use these allegedly infringing course packets: students. Under the increasingly generous reading of the contributory liability doctrine, however, all of that could change. After all, by paying for the packets, the students are making the creation of the packets profitable and inducing the allegedly infringing activity. Accordingly, they arguably provide material aide to the infringement and could face contributory liability. Moreover, students might face vicarious liability under the Supreme Court’s most recent characterization of the doctrine, which asserted that “[o]ne . . . infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”²⁹² Students arguably derive a financial benefit from the creation of unauthorized course packets because they are able to use these packets in lieu of much costlier, full, authorized versions of texts. In addition, students arguably decline to exercise their right to stop or limit this infringement by refusing to purchase the allegedly infringing course packets.

288. *Id.* at 801.

289. *See, e.g.*, Complaint, Blackwell Publ., Inc. v. Miller, No. 07-12731 (E.D. Mich. June 28, 2007), 2007 U.S. Dist. Ct. Pleadings LEXIS 8893.

290. For example, the Complaint in *Blackwell Publishing, Inc. v. Miller* states that, “by providing the means of reproduction and charging for their use [the Defendant] is just as much engaged in infringement as if its own employees made the copies, and its conduct constitutes willful infringement.” *Id.* ¶ 29.

291. *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1383 (6th Cir. 1996).

292. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (internal citations omitted).

All told, by bringing the unauthorized possession and private use of educational materials—even for purely academic and non-profit purposes—under the scope of infringement liability, such a result threatens to stifle the dissemination of knowledge, and hamstring a critical way in which use of copyrighted works advances personal development. Doing one’s homework could become very costly indeed.

2. Digital Distribution and the Violation of the Reproduction Right

The nature of digital distribution also makes it increasingly possible to render the possession and private use of an infringing work actionable. The process of obtaining an infringing work in digital form almost inevitably involves an act of reproduction directly triggered, at some level, by the user/possessor.²⁹³ This contrasts sharply with the process of obtaining an infringing good in the pre-digital world, where user/possessors cannot be held directly liable for the reproduction of the works themselves. For example, if I purchase an unauthorized recording of a live concert from a bootlegger, I have not committed a direct act of infringement because I have not reproduced, distributed, displayed, or performed the work in a way that violates any exclusive right secured under section 106.²⁹⁴ This is true even though the bootleg represents an unauthorized fixation of a musical composition without permission of the appropriate rights holder. If a friend makes me a mix tape and then hands it to me, section 106 is not invoked, even though the mix tape represents an unauthorized reproduction of several sound recordings without permission of the appropriate rights holders. But if I obtain the bootleg online, I have made a reproduction of a copyrighted work without authorization in direct violation of section 106(1). And if a friend emails me a mix “tape,” in the form of a digital file, the reproduction of that work based on the nature of digital distribution also triggers a section 106(1) violation. As some courts have recently held, the act of “requesting” a digital version of a protected work—which causes the work to be transmitted to one’s computer as a copy—constitutes a direct infringement of the

293. Quite simply, some sort of reproduction of the copyrighted work must exist for the work to be transmitted from the originating party’s network to the receiving party’s network.

294. See 17 U.S.C. § 106(1)–(5) (2006).

exclusive right to reproduction.²⁹⁵ Subject to fair use or another affirmative defense, this act of reproduction is infringing whether it is strictly for private purposes or not.²⁹⁶ Indeed, unlike unauthorized distribution, performance, and display, which must be public to implicate section 106, violation of the reproduction right (and accompanying right to prepare derivatives) requires no publicly-related act to constitute infringement.²⁹⁷

The nature of digital distribution not only triggers section 106 rights that pre-digital distribution did not, it also renders such activities more detectible and, therefore, susceptible to legal action. With logged IP addresses, digital fingerprints surround any infringing act, making tracking possible. So, for example, the previous sharing of music that flew under the radar in the pre-digital era is now made visible—a fact that the unfortunate targets of the Recording Industry Association of America’s (“RIAA”) litigation campaign against peer-to-peer file sharing have learned the hard way.²⁹⁸

The implications for identity formation and personal development issues become clear when we consider one of the most powerful ways in which we connect with our distant and deceased family members and with our ancestors: via photographs. Since the invention of the daguerreotype in the mid-nineteenth century,²⁹⁹ familial identity and kinship bonds have been both generated and intensified through the act of sharing

295. See, e.g., *Cartoon Network LP, v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 2890 (2009) (holding that when a user requests a digital copy of a television broadcast to be transmitted to his or her digital video recording device, the user has engaged in an act of reproduction, in defiance of section 106(1)).

296. 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.02(c) (Matthew Bender rev. ed. 2010) (“[S]ubject to the privilege of fair use, and subject to certain other exemptions, copyright infringement occurs whenever an unauthorized copy . . . is made, even if it is used solely for the private purposes of the reproducer . . .”) (footnotes omitted).

297. Compare 17 U.S.C. § 106(1)–(2) (requiring no public component to an act of reproduction or distribution to trigger violation of a copyright holder’s exclusive rights), with 17 U.S.C. § 106(3)–(5) (requiring public performance or display or distribution to the public to trigger violation of a copyright holder’s exclusive rights).

298. Using IP addresses, the RIAA famously sued approximately 18,000 individuals for infringing file sharing over the course of a five-year litigation campaign. See David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010, 1:24 PM), <http://www.wired.com/threatlevel/2010/05/riaa-bump/>.

299. 1 *ENCYCLOPEDIA OF NINETEENTH-CENTURY PHOTOGRAPHY* 365 (John Hannavy, ed. 2007).

family photo albums. In prior years, this act rarely implicated copyright issues. For example, if you had a trove of family photographs in your possession, you could freely share those photographs with your relatives when they came to your house. After all, the act of sharing family photographs in the pre-digital era did not implicate any section 106 rights—no reproduction, derivation, public distribution, public performance, or public display had taken place. Thus, it did not matter that you were not the owner of the copyright to many of the photographs in your possession. After all, the copyright to photographs is typically held by the individual who positions the shot and hits the shutter button, whether it is a professional photographer doing a family portrait, a random stranger kind enough to take a family shot at a tourist spot, or your cousin Belinda's boyfriend who has not yet earned his stripes as a bona fide family member and therefore dutifully volunteers to snap a shot and forgo being memorialized as one of the clan on celluloid. Moreover, it did not matter if the photographs in your possession were themselves a work of infringement: a reproduction of a photograph without authorization of the rights holder. Thus, the traditional sharing of family photographs did not infringe any exclusive right enjoyed by the works' copyright holders. In other words, possession and private use of an image without permission of the copyright holder created no specter of liability.

This analysis, however, changes radically in the digital environment. On one hand, the Internet allows the family photo album to be shared more easily among relatives. Websites such as myheritage.com have cropped up, allowing family members to create pages dedicated to the assemblage of family trees and the repository of family photographs. But the sharing of the photo album necessarily implicates at least one section 106 right: the right to reproduce.³⁰⁰ To put the albums on myheritage.com, one must make copies of the photographs. To do so, copyright law requires that we obtain the permission of the copyright holder³⁰¹ or seek refuge in an affirmative defense

300. 17 U.S.C. § 106(1). It arguably implicates another section 106 right as well: the right of public display. *Id.* § 106(5). However, if the site is closed off to all but family members, arguably no *public* display is occurring.

301. Although the copyright holder may have given ownership of the actual photograph, she has not assigned the copyright, absent a written agreement. *See* 17 U.S.C. § 204(a) (requiring all transfer of copyright ownership to be "in writing and signed by the owner of the rights conveyed or such owner's duly authorized

such as fair use. Thus, a form of non-transformative use involving substantial identity issues that was previously immunized from infringement poses legitimate liability questions.

3. The DMCA and the Criminalization of Private Use

Additionally, critics have long bemoaned the dangers of the anti-circumvention provisions of the Digital Millennium Copyright Act (“DMCA”) for their ability to retard fair-use rights, especially as more copyrighted works become available only or primarily in digital form.³⁰² But it is not just “fair uses” of copyrighted works (i.e., violations of section 106 rights excused under the fair use doctrine) that the DMCA anti-circumvention provisions implicate. By keeping copyrighted works under a digital lock that limits their uses specifically to those for which rights holders provide approval, the DMCA anti-circumvention provisions also create liability for certain acts of possession and private use that did not run afoul of section 106 in the first place.³⁰³ So long as there is no reproduction or derivation involved, private use of a creative work cannot constitute an act of infringement, even when the use occurs in a manner not authorized by a copyright holder.³⁰⁴ Don Henley and Danny Kortchmar cannot step into your bedroom and prevent you from making “All She Wants to Do Is Dance” the theme song for your self-actualizing, naked shaving ritual each morning, as repulsive as it might be to them, even if you possess an unauthorized copy of the song. But, it could result in liability under the DMCA, which provides that “[n]o person shall circumvent a technological measure that effectively controls access” to a co-

agent”). As a result, though one might argue an implied license has been given to copy the photograph, that is far from clear.

302. See Matthew Fagin, Frank Pasquale & Kim Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 477–78 (2002).

303. See Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 1015 (2006) (“The DMCA outlaws unauthorized access in almost all circumstances, and copyright owners assert that they have total control over the terms of access, even if that involves getting rid of copyright law’s limits on exclusive rights. Such limits include not just statutory fair use and statutory exceptions but even rights that copyright law does not give to owners, such as the right to control lending or private performance.”).

304. See 17 U.S.C. § 106 (granting no unilateral exclusive “use” right to copyright holders and prohibiting only non-public actions that involve reproduction or derivation).

pyrighted work.³⁰⁵ Under the DMCA, unauthorized private performances—acts that were previously non-infringing per se—can become potential felonies.³⁰⁶

The consequences of this legal transformation can be significant. Consider the impact on knowledge dissemination and study, for example. Imagine that, in an abandoned farmhouse in rural South Island, someone locates a complete print of *Salomé*, the long-lost epic silent masterpiece by legendary New Zealand auteur Colin McKenzie—a filmmaker who has never received his rightful due as one of the towering figures of silent cinema.³⁰⁷ The movie, which was completed and released in the early part of the twentieth century, has long fallen into the public domain and lost any copyright protection it may have had. No one has seen the movie for decades and, to reintroduce the motion picture to the world, a DVD is released. Since the work will likely not enjoy a widespread audience but, instead, a small group of devoted film aficionados who are desperate to view it, the DVD will also sell for a premium retail price. Using digital rights management, the DVD also limits purchasers to a single play.

While a film studies professor may want to view the movie for purposes of study to appreciate McKenzie's pioneering shooting techniques, unique narrative structures, and innovative contributions to New Zealand cinema, he will be limited in his ability and right to experience this important piece of cultural heritage and motion picture history. Although the professor's private performance of the movie at his own home would not implicate any section 106 rights—even if the film were still in copyright—he could face serious liability under the DMCA. He cannot borrow the film from a library—the DVD's

305. 17 U.S.C. § 1201(a)(1)(A).

306. 17 U.S.C. § 1204(a)(1) (providing for fines of up to \$500,000 and imprisonment of not more than five years for a first offense that is willful and “for purposes of commercial advantage or private financial gain”).

307. The widespread failure to give proper acknowledgement to McKenzie's directorial genius is probably a function of the fact that he does not exist. McKenzie is merely a creation of Costa Botes and Peter Jackson and is featured in their wry mockumentary documenting the discovery of McKenzie's long-lost masterpiece. *FORGOTTEN SILVER* (WingNut Films 1995). Following its broadcast in 1995, *Forgotten Silver* ignited widespread controversy after news reports about the long-forgotten McKenzie began to appear in legitimate publications touting the key role of this New Zealander in the history of film. Botes and Jackson ultimately had to do a mea culpa to the citizens of their country à la Orson Welles with *War of the Worlds*. *MERCURY THEATER ON THE AIR: WAR OF THE WORLDS* (CBS radio broadcast Oct. 30, 1938).

one-play-only feature curtails the ability of libraries to loan out the movie—and he cannot borrow the movie from a friend. He can purchase a copy, if he can afford to do so, but he can only watch the movie once, something no serious student of film would find sufficient. Should he successfully view it more than once—say, by circumventing the DVD’s protection measures—he will be in violation of the DMCA’s anti-circumvention provisions.³⁰⁸ Thus, the private viewing of a work likely in the public domain—something that would implicate no liability whatsoever in the pre-DMCA world—would now give rise to legal risk. By criminalizing the use of circumvention tools, the DMCA therefore makes copies of digital works significantly less available for private use and can adversely impact the dissemination of knowledge and the study of important cultural works.

4. The Anti-Counterfeiting Trade Agreement and the Future of Copyright Liability

Finally, pending international treaties and proposed legislation threaten to bring unauthorized possession and private use of copyrighted works under the scope of liability. In particular, the Anti-Counterfeiting Trade Agreement (“ACTA”) could pose a radical threat to previously protected user rights if its leaked early versions provide an accurate indication of things to come. Although many of its particulars are still shrouded in secrecy,³⁰⁹ ACTA purportedly seeks to enact a se-

308. The professor could conceivably get around the anti-circumvention provisions of the DMCA. Although the DMCA bans the circumvention of *access control* measures, it does not ban the circumvention of *copy control* measures. Compare 17 U.S.C. § 1201(a)(1)–(2) (prohibiting the circumvention of access control measures and prohibiting the trafficking in technology designed to circumvent access controls), with 17 U.S.C. § 1201(b) (prohibiting the trafficking in technology designed to circumvent copy controls). According to the legislative history, Congress intended to allow individuals who had lawfully acquired a copy of a work the right to make copies of that work, regardless of the digital rights management technologies appended to it. See *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1120–21 (N.D. Cal. 2002) (noting that Congress intended to preserve fair use rights of individuals who had lawfully obtained a copy). Thus, if the professor were to merely circumvent copy control measures, rather than access control measures, he would, in theory, not face liability: he could potentially do this by making a new copy of *Salomé* each time he wanted to watch the movie.

309. *Anti-Counterfeiting Trade Agreement*, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/issues/acta> (last visited Sept. 16, 2010) (positing that “disturbingly little information has been released about the actual content of the agreement”).

ries of copyright enforcement mechanisms that could undermine user rights worldwide.³¹⁰ Among other things, ACTA reportedly advances a three-strikes policy to which Internet Service Providers (“ISPs”) must adhere in order to retain their safe harbor from liability for the infringing activities that might occur on their networks.³¹¹ Specifically, the three-strike policy would potentially require ISPs to terminate the broadband internet connection of any customer who is accused of infringement three times.³¹² Early critics of these proposals have questioned the types of procedural safeguards that ACTA provides prior to termination to ensure that the banishment conforms with due process norms and provides for reasonable adjudication of disputed infringement claims.³¹³ Indeed, these critics raise concerns that unsubstantiated accusations of infringement, or the invocation of one’s fair-use rights, may lead to complete loss of internet access.³¹⁴ Whatever the actual procedures, it is only slight hyperbole to suggest that, in the twenty-first century, this is the legal equivalent of being banished from civilization—the strongest punishment (aside from death) that traditional societies inflicted upon their members.

Consider the example of Cathi Paradiso, a grandmother from Pueblo, Colorado. Responding to pressure from the content creation industries, her ISP (Qwest) had instituted a policy to suspend, if not terminate, the accounts of those accused

310. For an examination of the broader history and significance of ACTA, see Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 YALE J. INT’L L. ONLINE 24 (2009), <http://www.yjil.org/pubs/online/item/4-the-impact-of-acta-on-the-knowldge-ec.pdf>.

311. Gwen Hinze, *Leaked ACTA Internet Provisions: Three Strikes and a Global DMCA*, ELECTRONIC FRONTIER FOUNDATION (Nov. 3, 2009), <http://www.eff.org/deeplinks/2009/11/leaked-acta-internet-provisions-three-strikes-and->.

312. *See id.*

313. *See* Steven Seidenberg, *The Record Business Blues*, 96 A.B.A. J. 55, 59 (2010) (noting a “huge outcry” against the three-strikes provision and that a key concern “is that throwing people off the Internet for online infringement of copyrights would be a draconian step in an increasingly digital world”).

314. Kathy McGraw, *ACTA: Why You Should Be Concerned*, DRM NEWS (Feb. 6, 2010), <http://www.thedrmnews.com/miscellaneous/acta-why-you-should-be-concerned> (“While it appears that the final ‘strike’ of complete disconnection must be administered by a judge, it is uncertain what sort of proof, if any, would be required.”).

by copyright holders of online infringement.³¹⁵ One day, without notification, Paradiso found herself unable to connect to the Internet at home.³¹⁶ When Paradiso investigated the matter, Qwest informed her that she had illegally downloaded eighteen television shows and movies, including *South Park* and *Zombieland*.³¹⁷ Grandmothers do not usually fall into the *South Park* and *Zombieland* demographic, and Paradiso was no different in this regard. In fact, she had never used the Internet to download any movies of any kind.³¹⁸ “Take me off your hit list,” Paradiso pleaded, “I have never downloaded a movie. Period.”³¹⁹ But Paradiso’s protests fell on deaf ears until the media caught wind of the story and rallied to her aid.³²⁰ Had she not received support from the Fourth Estate, however, she would have had no independent third party to hear her complaint and would have received no due process to challenge the allegations against her. Qwest would have simply terminated her connection at their sole discretion. And, to make matters worse, her name would have been made available to other internet service providers, thereby creating a veritable “infringer blacklist” that would have hampered her ability to purchase broadband from an alternative source.³²¹ The consequences of such a move would have been particularly damaging for Paradiso, who is an artist working from home on her computer.³²² “My computer is not a toy,” she told Qwest, “My livelihood depends on my ISP’s reliability.”³²³

Meanwhile, ACTA also empowers customs officers at border crossings to search laptops, smart phones, and other devices with hard drives—not for detonation devices that might threaten national security, but for content that infringes copyright law.³²⁴ Besides raising substantial privacy concerns, the

315. Greg Sandoval, *Grandma Endures Wrongful ISP Piracy Suspension*, CNET NEWS (Feb. 1, 2010, 4:00 AM), http://news.cnet.com/8301-31001_3-10444879-261.html?tag=mncol;mlt_related.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. See Charles R. McManis, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty*, 46 HOUS. L. REV. 1235, 1253 (2009) (noting the potential of ACTA to enable border searches of such personal electronics as portable music players and laptops).

viability of charging customs officers with the interpretation and application of copyright law—a complex field that has few hard-and-fast rules and creates exegetical disagreements among even experts—in the span of seconds at a border crossing, strains credulity. With the strong support that ACTA is receiving from lobbying interests acting on behalf of the content-creation industries,³²⁵ the proposal also raises serious concerns that hard-drive searches will create an *in terrorem* effect to stifle any manner of unauthorized possession or use of copyrighted content, whether legitimately excused by law or not.

ACTA also threatens to authorize the imposition of criminal sanctions against those who willfully infringe, regardless of any absence of motivation for financial gain,³²⁶ a dramatic expansion of criminal liability without parallel in copyright history. The consequences of this radical change in law would be significant, criminalizing many more acts of infringement, including private ones, than ever before. Combined with the reality that the nature of digital distribution has enabled unauthorized acts of possession and private use to come under the scope of the Copyright Act and be subjected to tracking, adoption of ACTA could easily transform our infringement nation into a criminal nation.

ACTA is driven by a popular narratives about how the creative industries have ceded control of their production to the seemingly irreversible tides of online infringement.³²⁷ To be sure, piracy is a serious concern, but it does not represent the entire story of the digital revolution. While the diffusion of duplication technologies has enabled individuals to infringe the copyrights of rights holders on a scale never before witnessed, recent technological and legal developments have done something else altogether: they have paradoxically enabled copy-

325. According to the Electronic Frontier Foundation, much of the draft language of ACTA “is reminiscent of entertainment industry demands—and nowhere in the draft is there mention of the rights of individual consumers and the IP balance driving innovation in the knowledge economy.” *Rein In ACTA: Tell Congress to Open the Secret IP Pact*, ELEC. FRONTIER FOUND., <https://secure.eff.org/site/Advocacy?cmd=display&page=UserAction&id=420> (last visited Jul. 16, 2010).

326. Margot Kaminski, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 *YALE J. INT’L L.* 247, 252–53 (2009).

327. See, e.g., Nate Anderson, *Praising, Cursing ACTA: Reactions Roll In*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/04/praising-cursing-acta-reactions-roll-in.ars> (last visited Jul. 17, 2010) (“[ACTA] represents a solid building block, an important step forward in the work of like-minded governments to strengthen protection against Internet piracy, the fastest growing threat to filmed entertainment and other segments of the copyright industries.”).

right holders to exercise greater control over how individuals can consume works than at any other point in human history. The vital personhood interests identified here offer yet another key reason to scrutinize that trend closely.

CONCLUSION

As we have seen, it is not just transformative uses of copyrighted works that vindicate key developmental and expressive values. Rather, the non-critical, pure use of copyrighted works plays a vital role in advancing personhood interests in at least two ways: through the formation of identity and the expression of identity. The existence of these formative and expressive processes provides a strong Hegelian basis to question the unfettered expansion of copyright protection for authors and owners.

Yet, while extant theories of copyright support the rights of putative creators to control use of their intellectual property on utilitarian, labor-desert, and personhood grounds, the interests of the user in the definitional and semiotic values of these properties has received short shrift.

Indeed, as we have seen in our case studies involving Old Glory and the Lone Star flag, *The Serenity Prayer*, the term “Olympics,” and the song “Kookaburra,” doctrinal features of our intellectual property regime—the limited dedication of certain government works to the public domain, the notion of authorship upon which copyright protection is dependent, the growth of trademark law beyond guarding against consumer confusion, and the expanding duration of the copyright term—have resulted in a failure to account fully for the formative and expressive identity interests that users possess in intellectual property. As such, we enable our intellectual property regime to patrol the development and expression of nationalistic, religious, cultural, and sexual identities with insufficient scrutiny of the broader consequences of this regulation.

Meanwhile, even where our regime has traditionally granted implicit recognition of user identity interests—through the relative immunization granted to the private use and possession of unauthorized copies of copyrighted works—such protections are growing increasingly fragile. The nature of digital distribution along with legal developments such as the implementation of the DMCA’s anti-circumvention provisions, the growing scope of secondary liability doctrine, and the proposed

reforms in ACTA threaten to make possession and private use of copyrighted works punishable, even though they have not traditionally implicated exclusive rights protected under section 106 of the Copyright Act. Activities that form identities, shape familial bonds, and advance personal development—e.g., the private sharing of family photo albums, the private use of photocopied scholarly articles by students, and the private enjoyment and study of film by cinephiles—now risk generating liability exposure for the first time in history.

This Article has taken a modest, but important, first step in identifying the personhood interests at stake for users of copyrighted works, providing a theoretical framework for consideration of these interests, and highlighting the ways in which the law insufficiently accounts for them. Thus, the analysis provides a template for both resistance and reform. On one hand, a personhood theory of user interests warrants skepticism over attempts to expand the scope of infringement liability to include the private possession and use of unauthorized editions of copyrighted works, a heretofore protected zone of activity that supported individual access to cultural works and advanced the use of creative content for personal development. Indeed, the invasion of copyright law into the private sphere is afoot. Without counteractive measures, policy proposals in ACTA suggest that we may soon witness the mass criminalization of unauthorized uses within the home and the transformation of our border patrols into veritable copyright “Keystone Kops,” charged with searching private laptops and hard drives for unauthorized materials.

On the other hand, a personhood theory of user interests also causes us to re-examine extant features of our intellectual property regime. As protection terms have grown longer, we have seen aspects of our cultural and national heritage become owned and regulated by copyright holders, thereby impacting the formation and expression of cultural and nationalistic identities. As crowd-sourcing and interactive acts of authorship continue to occur more frequently, especially with the rise of digital technology that enables strangers from around the world to collaborate in the creation of collective works, copyright’s problematic notion of authorship increasingly threatens to place exclusive rights in the hands of a single entity that can then inequitably limit uses of those works by all others. As trademark law has expanded beyond consumer confusion, and sui generis protections are passed for such terms as “Olympic,”

we have witnessed the very components of our language—words—placed in the hands of private entities who, in turn, can constrict our imaginative palettes and patrol insider-outsider divides and social fault lines.

All the while, however, the predominant discourse of intellectual property maximalists continues to appeal to personhood interests—of authors, not users—as a basis for the further ratcheting up of protection. Ironically, current efforts by copyright maximalists to prosecute their vision of copyright law—efforts that center on convincing, either by economic muscle or legal reform, internet service providers to terminate the internet connections of accused infringers—betray this denial of the very real personhood interests that users possess in intellectual property. After all, the ultimate punishment in the digital age is the loss of one's digital lifeline. Termination of one's broadband internet is akin to digital execution: the death of one's person in the twenty-first century. Perhaps more than anything else, the very weight of this threat—upon which the content creation industries now rely for enforcement—speaks to the identity politics of intellectual property and to the inherent personhood interests that users have in the copyrighted works with which they interact. After all, internet access secures intellectual property access, and, without such access, individuals are cut off from modern digital society. In the end, therefore, the threatened punishment proves the existence and value of the very personhood interests for users that copyright maximalists have for so long downplayed.