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A Logical Proof That the Common Good, Not Economics, Underlies Copyright

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A Logical Proof That the Common Good, Not Economics, Underlies Copyright

Michelle M. Wu

The debate over copyright’s purpose understandably spends the bulk of its time dissecting legislative language and court opinions. At present, the prevailing theory of copyright is economic, while others argue that the Constitutional commitment to the “progress of science and useful arts” has greater weight than economic theories. Both sides can cite to judicial language backing their interpretations, and the frequency and cost of litigation between those representing the two interests have noticeably increased over recent years.¹

This article aims at a simpler way to resolve the dispute, by taking a step back and starting with the definition of a government. The government of a democratic republic, particularly one described as “of the people, by the people, and for the people,”² has a single purpose: to address the common concerns of its people.

The focus on common concerns provides a rational justification for government interference with everyone’s life and explains when such interference is accepted by the public without much protest. If everyone could live peaceably with each other without government action, then there would no reason for governments to exist. And if government action will not ultimately improve the well-being of the population, and therefore the nation, it would be unwarranted and unwelcome. This does not mean that individual government actors consistently adhere to the principles of common good or that they do not act serve their own self-interest, but it does mean that when searching for the meaning of a law that binds all of a nation’s people, the overall purpose of the government must ground the analysis.

The following philosophical argument is a companion piece to the legal analysis found here, but instead of focusing on the law, it presents a logical proof that the common good, and not the promise of economic activity, was the motivation for US copyright. Further, that the continued commitment to the common good explains the reality of copyright in the US today.

Copyright at the Time of Adoption (United States)

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¹ As an example of how the same court cases can be used by litigants on opposing sides, see the party briefs in Hachette v. Internet Archive, No. 1:20-CV-04160-JGK-OTW. For examples of cases pitting the public interest against the economic theory of copyright, see Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Cambridge Univ. Pr. v. Patton, 769 F.3d 1232, 1233 (2014); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 101 (2d Cir. 2014); Hachette.
² Abraham Lincoln, Gettysburg Address (1863).
The nutshell version of the historical proof is this:

- The responsibility of a sovereign power (i.e., government) is to address common concerns.\(^3\)
- Where 2% of the population wrote the types of works where making money was even theoretically possible,\(^4\) granting greater opportunities for profit for this occupation (as opposed to valuing equally the profit opportunities of 100% of occupations) logically cannot be said to have been a common concern of the nation at the time of founding.\(^5\)
- In contrast, the distribution and access to knowledge, new and old, was a known shared interest, as evidenced by the high demand for reading materials, whether factual (e.g., news stories) or fictional (e.g., literature).\(^6\) The people, and therefore the government, had reason to act to meet that demand.

There are, of course, other common interests contained in copyright, such as preventing unjust enrichment, avoiding the confusion inherent in conflicting state laws,\(^7\) or establishing conditions conducive to growing local talent, but these other common interests are compelling across all industries so cannot explain the special treatment accorded to intellectual property in the Constitution.

What makes intellectual property unique is its form and its potential impact. It is intangible, so cannot be captured or taken by force, and the creator can benefit from it without ever releasing it to the public. After all, one can make up a story and tell it to their own children without ever putting it in a capturable physical form. The same cannot be said about other creations; if a furniture maker wants to use a chair, the chair must have physical form to be used. Once it has physical form, it can then not only be used but lent, bought, and traded.

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\(^3\) **JEAN BODIN, THE SIX BOOKES OF A COMMON-WEALE** 1 (1606) (trans. Richard Knolles) (describing all commonwealths as having the purpose of meeting common concerns).

\(^4\) No definitive data exists on the number of American authors at the time the Constitution was signed, but the Library of Congress does have an Early Copyright Records Collection which shows a total of 721 deposited title pages in 1790. Even if we used this as a generous proxy, assumed that every work was written by a different author, and that all items were written at the time of the nation’s formation, authors would make up only about 2% of the population. **721 title pages**. [Library of Congress’ database; records found outside of LoC; Census data from 1790]. Note: it is possible that additional works had protection, as scholars have found copyright records outside of LC’s. It is also recognized that authors do not necessarily publish all in the same year so there may be many authors alive that would benefit from copyright who did not publish in the year 1790, but the data set does offset this, as authors unable to file for copyright up until government recognition all filed in this first year of protection.

\(^5\) Some might think that there was a common interest in this < 1% in that the federal government could collect income taxes from these individuals, in which case, the entire country had an interest in the funds raised. However, there was no federal income tax at the time of founding. [https://www.archives.gov/milestone-documents/16th-amendment; https://www.wolterskluwer.com/en/expert-insights/whole-ball-of-tax-historical-income-tax-rates;]


One cannot force the physical manifestation of an idea; it remains in the creator’s head until such time that they choose to put into a permanent form, and it may change innumerable times in the meantime. If a society wants to benefit from having this type of property available for public consumption, it must be in a physical form. Once an idea has physical form, it can be shared and multiplied in a way that no other physical goods can. Intellectual property is knowledge, a resource that is inexhaustible. Duplicating, sharing, altering, or even destroying the physical form does no damage to the property itself. There is no way to use up knowledge, and the thousandth person to gain the knowledge receives it in no lesser form than the first person. It retains its power no matter how many people have access to it, and it can (theoretically) be gained simultaneously by the entire world without any diminution in its utility. A nation’s people have a common interest in cultivating inexhaustible resources because they hold the potential for every person to obtain the same benefit without reducing anyone else’s access.

It is this potential for public access to knowledge that serves as the common interest of the country and as the backbone of the federal government’s interest in copyright. To encourage the transformation of the intangible to the tangible, so that it can be shared with the people, the government offers creators a reward (i.e., copyright) for an action unnecessary to the creator’s own use but holding the promise of benefiting many others. That the reward may be used by the author to their financial benefit is a side effect of the reward but not the purpose of it.

Longer Proof

The Copyright Clause itself is the first indication that the government’s primary purpose was for public advancement, not for private interest. It gave to Congress the power “…[t]o 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.” Several earlier phrasings had been proposed where the public purpose was absent but none were adopted, giving weight to the premise that the changed wording itself was critical to inclusion. While the Convention’s notes on its debates shed little light on what the Founders were thinking, James Madison’s correspondence provides insight:

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8 There are earlier indications, such as in materials presented to the Continental Congress, but this article will use as its starting point the U.S. Constitution (including the debates surrounding its adoption). Also, note: there is absolutely an economic interest in copyright: the author’s. But an author’s economic motivation to want copyright protection does not translate into a government’s interest in the same. The government can adopt the same mechanism as the one an author prefers while aiming for a completely different goal.

9 U.S. Const. Art I, Sec. 8, Cl. 8.

Monopolies tho' in certain cases useful ought to be granted with caution, and guarded with strictness against abuse. The Constitution of the U.S. has limited them 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 might otherwise hold 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 recompence and encouragement may be given.11 (emphasis added)

Copyright protection was the most effective enticement the government could offer an author to overcome any reticence to publish. Without protection, any author publishing a book risked having the profit from publication taken by someone who had neither contributed to the making of the work nor paid the author for the use of the work.12 And that risk might well appear too great for an author to willingly release their work to the public. The potential deterrent effect of the lack of copyright was not merely a hypothetical one, but one that had been voiced by authors. For example, Joel Barlow had written to the Continental Congress years earlier:

Indeed we are not to expect to see any works of considerable magnitude, (which must always be works of time & labor), offered to the Public till such security be given. There is now a Gentleman in Massachusetts who has written an Epic Poem, entitled “The Conquest of Canaan”, a work of great merit, & will certainly be an honor to his country. It has lain by him, finished, these six years, without seeing the light; because the Author cannot risque the expences [sic] of the publication, sensible that some ungenerous Printer will immediately seize [sic] upon his labors, by making a mean & cheap improvisation, in order to undersell the Author & defraud him of his property.13

Madison’s description of copyright as compensation to the author may mislead readers to assume that the purpose of copyright is financial, but compensation comes in many guises that require no remuneration (e.g., the waiving of rights, trade in goods, etc).14 Compensation in the case of intellectual property is in the form of control (i.e., copyright, patent, trademark). It is not a guarantee that the author will make any money from their work, but merely gives authors the ability to control their work such that where profit can be made, they hold sufficient legal rights

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11 Elizabeth Fleet, Madison’s “Detached Memoranda,” 3 Wm. & Mary Q. 534, 551 (1946)
12 https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783b
13 Letter from Joel Barlow to the Cont’l Cong. (1783), PRIMARY SOURCES ON COPYRIGHT (1450-1900) (The National Archives, Ctr. for Legis. Archives: Papers of the Cont’l Cong., RG 360, 4: 369-373 (No. 78)), www.copyrighthistory.org [https://perma.cc/K93N-G5AE].
14 To get a sense of the variety of consideration, see Restatement (Second) of Contracts § 71-81 (1981).
to claim it above others. Further, control bestowed benefits far beyond the financial, creating a written government record to support any equitable claims against misuse or to prevent others from falsely claiming authorship of something the author had written.

Further evidence that the private profit of authors was not the purpose of copyright can be found in the first copyright act of the nation, which had a copyright term of 14 years (with a renewal term of 14 years); limited protection to books, charts, and maps published in the US where the author was an American citizen or resident; required recordation; required deposit with the Secretary of State for preservation purposes; and permitted piracy of works written by non-American citizens and residents published outside of the U.S. Each aspect of the law benefitted the general public, regardless of impact on the authors’ economic interests.

The copyright term gave monopoly rights to authors but only for a relatively short period of time, and the requirement that an author register the work to obtain protection and then again to claim the renewal period increased the likelihood of non-compliance. An author who did not file for protection, or who forgot to renew their copyright, had no copyright protection (or lost such protection), allowing all to use the work freely.

Explicitly excluding from copyright protection the publishing, vending, and distribution of works published outside of the US and written by foreign authors is the clearest proof that the government justification for copyright had nothing to do with authors’ financial interests. Such exclusion essentially authorized widespread piracy of foreign works, denying their authors the rights to control use and profit from their works. This exclusion did, however, serve two public interests.

First, it guaranteed the replication and distribution of reading materials to the American public without needing to develop a deep bench of American authors. In the case of foreign authors, the government could meet its end goal --- publication of a continuing stream of written works – without extending protection to authors. In fact, its end goal was reached more effectively by ignoring any rights of foreign authors and therefore, it was to the common good (of Americans) to deny such protection.

The fear that American authors would refuse to publish without copyright protection was absent with other authors simply because those authors were not releasing their works first in the US. Their publications in their home countries would occur with or without American copyright; what determined the likelihood of first publication was copyright protection in the place of initial publication. Once the intangible had been reduced to tangible form and sold anywhere, the government’s goal had been met.

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15 Copyright Act of 1790, 1 Stat. 124 (1790).
Therefore, it made sense to offer such protections to American authors who published in the US simply because the US was the most likely place of first publication for them. It was the place where an author would decide whether or not to make a physical form of their work available to the public. In contrast, for foreign authors, the government could simply wait for the publication abroad and reliably expect that American publishers would promptly import them, pirate them, and sell copies. The exclusion unquestionably hurt the economic interests of foreign authors, but since American authors produced insufficient content, both qualitatively and quantitatively, to satisfy the reading public, the piracy of other works met the public’s common interest in access to written content.

Second, piracy furthered national interest by sustaining local industries. Without national industries, the US would remain reliant on the willingness of other nations to provide goods, negotiate in good faith, and to put the interests of American citizens on equal footing as their own citizens (an unlikely prospect for any country). By relieving publishers of the financial costs related to paying for the rights to publish foreign works, the US government created an environment where publishers had continual access to a rich corpus of materials from which to make a profit without diminishing their returns by having to pay authors. Some might point out that publisher or industry profit is an economic interest, but it is important to note that the economic interest here was to deny copyright, not to establish it. Publisher financial well-being improved the more they used pirated content, with 80% of some catalogs featuring works unprotected by copyright, so even industry profit cannot be cited as a reason for government-supported copyright.

Last, the required deposit of a copy of a work with the Secretary of State also did not help the economic interests of an author. If anything, this was a financial burden, as the copyright owner bore the costs of production and deposit. The requirement, though, is consistent with the public’s common interest, in this case, the common interest in preservation, that knowledge once given physical form would continue to be verifiable in physical form.

**Present Times**

16 Foreign authors could gain protection if they were US residents publishing in the US and filing for protection locally, but most foreign authors did not fit this definition.
18 Spoo at 14, 60-1; George T. Dunlap, The Fleeting Years (1937), in Publishers on Publishing 271–72 (Gerald Gross ed. 1961) (discussing how the first catalogs of publishers like Harper, Wiley, and Putnam were comprised of 90% pirated works).
19 Id.
20 This is, of course, theoretical preservation, as government offices had no requirement to keep all that they had received through deposit.
Today, when copyright lasts 70 years after the death of an author, foreign authors are as protected as American authors, and virtually any type of writing is automatically protected by copyright, the historical proof above will seem to have lost any weight. However, a different proof can demonstrate how the initial motivations behind US copyright continue to be reflected in copyright’s practices today.

The shorthand form of the present-day proof is this:

- The vast majority of works protected by copyright are not made for economic gain (e.g., emails, journals, school essays, doodles, personal pictures);
- The vast majority of copyright uses are not for economic gain (e.g., the private sharing of any of the items in the previous bullet, recitals, DVR recordings, personal remixes or covers, fan fiction or art);
- Many copyright uses that have the potential of impacting sales --- resale, donation, lending, provisions to the print disabled – are explicitly permitted, and others may claim an exception under fair use.
- The public benefits from daily unpaid use of copyrighted works (e.g., emails, social media, Google news).

In other words, if copyright is wholly an economic theory, and most of copyright has no economic weight, the rationale for retaining it disappears. It is only by referring back to the common interest in the potential public access to knowledge that the justification for copyright remains.

Longer Proof

Instead of analyzing copyright changes year by year and explaining how each consistently furthers the public good even where it fails to protect financial interests, the longer proof in the current era is best illustrated by examining copyright in operation. In particular, this section will explore the questions and answers that seem contradictory under an economic theory but which can easily be explained if copyright is instead grounded in the common interest of the potential for public access to knowledge.

Why protect works with no commercial purpose?

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21 The term of copyright is not quite as straightforward, depending on when a work was published and how it was published. For an overview of copyright terms, see https://guides.library.cornell.edu/copyright/publicdomain
23 17 USC §§108-109, 121.
24 17 USC § 107.
If copyright were purely economic, there would be no reason to grant copyright protection to works created without commercial intent (e.g., private photos), as the creator is making nothing that benefits the public and so neither deserves protection nor needs a government incentive for creation. But the potential for public access to knowledge holds value to society, independent of paid sharing.

Knowledge is more likely to be “created” in the copyright sense (i.e., fixed in a tangible medium of expression) if the author is assured that it cannot be taken from them and misused. If one’s private pictures and diaries could be published without one’s approval, one might never record them, or even if recorded, might be incentivized to destroy them. But if recorded and preserved, the potential for sharing of the knowledge always remains. A journal may eventually provide the foundation for future works like music, documentaries, or books (e.g., biographies); letters and early drafts may later become available to scholars seeking insight into the thoughts of historical figures; and unearthed old photos may be aggregated to document how a historical landmark has changed over time.

Knowledge creation and preservation also serve purposes other than those rewarded by later research or publishing, such as in its use to resolve disputes (e.g., photograph to verify someone’s presence at a crime scene), build relationships (e.g., letters), self-improvement (e.g., journals), expression (e.g., a child’s artwork), and experimentation (e.g., early drafts). Since human memory is notoriously unreliable, the recording of knowledge serves the general purpose of providing contemporaneous accounts of events, even where it has no obvious external use at the time of creation or is never used externally. Copyright acknowledges these and other non-commercial-oriented societal benefits in knowledge creation by awarding protection to all works, with or without an economic purpose, through guaranteeing the creator of a work the rights (1) to claim the work as theirs, and (2) to control when the work is published (if at all).

Why first publication carries more weight than later reproductions

26 See for example: https://csac.history.wisc.edu/publications-2/dhrc/, https://www.alexanderhamiltonexhibition.org/about/Ron%20Chernow%20Interview.pdf
28 Daniel Kahneman, Thinking Fast and Slow (2011) (in particular, Chapters 4-5).
29 Government-recognized ownership of copyright serves as protection to the author against misuse, plagiarism, invasion of privacy, etc.
30 Note that publication is much narrower than use. A sister who receives a letter from a brother may read it to her other sister, and it would be astonishing if copyright stopped such normal uses (see Reasonable Uses subsection). And a party to a lawsuit, for example, would not be able to use copyright to refuse to provide copies of emails during discovery. Fair use applies to unpublished works as well as published ones.
In Harper & Row v. Nation Enterprises, the Nation published an article on a yet-to-be-released book by Gerald Ford containing verbatim quotes from the book. Harper & Row, the publisher of the book, had earlier contracted with Time Magazine to publish a summary, a contract that Time cancelled once the Nation’s article was published. The court determined that the Nation had infringed on the right of first publication under copyright and used the canceled contract as proof of harm.\(^{31}\) The ruling has been used to reinforce the idea that copyright is fundamentally about economics, since it was the financial harm (or potential for financial harm) that drove the court’s reasoning. But the common good of knowledge is not so narrow in its analysis, showing that first publication protects interests beyond the financial, and therefore, equitable infringement claims are valid absent any potential or real financial harm.

For instance, many scholarly articles will never make money and are not intended to make money, so the unauthorized publication of early drafts would have no monetary impact on the author. But if one’s drafts shared only with a select few for comment could be widely distributed without the author’s consent,\(^{32}\) the risks of reputational harm and of spreading poorly researched data or misinformation is significant. Early iterations may not reflect later fact verification, correction, or peer review, and early release can open the door for others to publish the conclusions first, falsely claiming credit for discovery. Such premature use can discourage an author from sharing their work even in limited form, or from finishing their work, giving rise to conditions where preliminary drafts are the final word, perpetuating less useful (if not harmful) information.

Where a work is intended to be published, society’s interest in copyright prior to publication is in ensuring that the creator has enough freedom to experiment, workshop, research, verify, and modify their creations without fear that delay or sharing the work for comment will put them at risk of having their reputation or the commercial value of their work being injured by premature use.\(^{33}\) The act of publication signals that the author is finished with their expression and is ready for it to be shared. At that time, society’s interest shifts to the spread of information (including drafts) as sharing no longer has a potential deterrence effect on creation; the final work has already been created and disseminated. Therefore, granting greater protection to the author for first publication encourages better quality control of knowledge.

\(^{31}\) 471 U.S. 539 (1985)
\(^{32}\) This is not to say that fair use is inapplicable, simply that it is narrower in scope for unpublished works. Fair use unquestionably still does apply, such as if a news organization gets a copy of document that shows illegal activity. They would still have the right to report on it and show the content, as the purpose is not about the substance of the work (e.g., selling the contents) but rather about how the work proves illegal activity.
\(^{33}\) That is not to say that the work cannot be used under some conditions, as there are instances in which neither misinformation nor preemption are an issue (e.g., early drafts of proposed bills as drafted by special interests), where the sharing of information has such compelling societal value that it outweighs control interests (e.g., a photograph of a crime that was purchased by a publisher solely to suppress it), or where use is a natural outgrowth of access (e.g., a draft of a paper shared for a job talk may be used by recipients to support their own scholarship, such as quoting from it)
before release to the public. It speaks to both the interest in knowledge creation (providing protection necessary to honing works before publication) and in knowledge sharing (creating conditions conducive to publishing higher quality information).

For works not intended to be published, the common good in first publication protection is two-fold: the interest in privacy and the interest in the potential public access to the work. It reserves to the creator the decision whether to publish their work while simultaneously offering incentive to publish should they be willing to waive their privacy concerns.

**Why Are So Many Daily Infringements of Copyright Tolerated in the Breach?**

*Reasonable Uses*

Everyone engages with copyrighted works daily in ways that unquestionably reproduce, distribute, make derivative works from, and publicly perform/display them. Examples include serenades, auditions, busking, piano recitals, sing-alongs, mixed tapes, fan art, recording radio or television programs, forwarding emails, converting an LP to an MP3, saving a copy of a web image for use in a work presentation or as a desktop image, use by strikers to keep spirits up on a picket line. These activities all involve one or more of the rights reserved to the copyright owner in §106, and could theoretically impact sales, but copyright has historically treated them as outside of its scope or as fair use.

This is because all of them are predictable and reasonable outgrowths of knowledge consumption. A creator’s purpose in publishing a work is to communicate something – an emotion, a thought, beauty, a theory, analysis, instruction, and so forth – to the public. An author’s decision to publish necessarily seeks to appeal to an audience, whether they are doing it to make money, to educate others, or for another purpose; without people to listen, read, view, or use their work, they cannot achieve their ends.

The act of publication is a physical manifestation of the expectation and hope that others will find something meaningful in their work, and it is natural for those who do find meaning to want to share it and use it. People will be moved to share the songs, poems, art, or shows they love with others, quoting from them, reenacting them, taking pictures of them, and singing them; they will use them to teach, whether in the classroom (e.g., acting out a play to learn how to properly project a voice) or outside of it (e.g., using a bedtime story to help a child learn to read);

34 “For the author seeking copyright protection…disclosure is the desired objective, not something exacted from the author in exchange for the copyright.” Eldred v. Ashcroft, 537 U.S. 186, 216, 123 S. Ct. 769, 787, 154 L. Ed. 2d 683 (2003).
they will use them to express emotion (e.g., using a song to console a child); they will repurpose them for use in their lives (e.g. replacing lyrics in a song to help them remember a lesson); they will invent new adventures for their favorite characters (e.g., fan fiction); and they will see or create connections between them and other works they love (e.g., mashups).

Among other benefits to society, these activities reach people and occupy distribution channels where commercial activity is absent or has no likely foothold. A busker, a mixed tape, or an impromptu sing-a-long at a tailgate may expose listeners to songs that their own listening habits would never find; a library story hour may be heard by people unable to buy the work (e.g., the poor) or unable to access the work themselves (e.g., illiterate). Not only is there no common interest in copyright being a barrier to such sharing, but there is a common interest in a work’s organic perpetuation (i.e., the sharing of knowledge with another).  

Knowledge sharing, like knowledge creation and knowledge preservation, has societal value beyond the financial. It makes it possible for everyone to gain some access to culture and education --- items without which there is no informed citizenry --- regardless of wealth, ability, status, or biases. Further, when dealing with published works, it gives less popular works or authors opportunities to be discovered, not tying the fate or visibility of any work solely to commercial practices; it enables a work or an author to rise above societal or genre biases (e.g., women or minority artists on country radio); and it creates unexpected opportunities for works to gain a following (e.g., first Harry Potter book), which in turn rewards knowledge creation in elevating an author’s name, reputation, the value of the work, so that the author will have greater leverage in negotiating terms for future works. Even when a person exposed to a work does not

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35 One might note that in the case of misinformation, the common good is not served by perpetuation. While true, this does not mean that copyright itself does not serve the common good. Copyright is merely a tool that is justified by its potential to serve the common good. That it can be used for evil makes it no different from any other tool (e.g., a knife made to cut rope or food can also be used to kill someone. That it can kill someone does not mean that the tool itself does not serve a positive societal purpose).

36 See, for example, Mia Venkat, TikTok has changed music — and the industry is hustling to catch up, NPR (May 22, 2022), https://www.npr.org/2022/05/22/1080632810/tiktok-music-industry-gayle-abcdefu-sia-tai-verdes-celine-dion


39 Many creators have recognized the positive effect of non-commercial use on sales and/or reach in a variety of different media, some of the most famous of which are the Grateful Dead, Neil Gaiman, George Lucas, and Taylor Swift. See, for example, Martin Kielty, The Moment The Grateful Dead Decided to Let Fans Keep Bootlegging (August 11, 2019, https://ultimateclassicrock.com/grateful-dead-bootlegs/ (“[T]hat was a brilliant move as far as us
care for the substance of it, knowledge still has beneficial uses, such as in recommendations to others, in the demonstration of skills (e.g., vocal or emotional range in an audition), and in the ability to understand context (e.g., recognizing a popular reference).

Reasonableness varies widely by the type of work and manner of expression, of course, and might be best based on a reasonable person standard. Such a standard has been used elsewhere in law and criticized heavily for its subjectiveness and inclination towards reinforcing biases. In copyright, though, such a standard might be less subjective for a unique reason: every artist is also an information consumer. Non-creators and creators alike regularly engage in activities that use copyrighted works without the author’s permission and therefore, there should be universal points of reference. For example, most people (whether artist or user) are likely … to find reasonable a family member showing their friends pictures of a grandson’s graduation, even though this means distributing an unpublished work; to find reasonable a teacher asking students to mark-up copies of a haiku to test them on their ability to analyze it, though this involves reproduction and distribution; to find reasonable a friend receiving a mixed tape to play it aloud at a picnic, even if this exposes people other than their family and friends to the music; to find unreasonable the posting of a private picture to a revenge porn site; and to find unreasonable someone’s making and posting of a bootleg movie on a pirate site. Note that reasonableness is not about someone saying that the activity is likely to be caught or that the activity should be punished, but only whether the use is a reasonable outgrowth of access to or consumption of that work.

Facilitating the finding, sharing, and exploration of meaning and application is the common interest underlying copyright. Therefore, copyright has no reason to try to stop the very type of consumption, use, and spread that it was established to foster. With societal interests in getting our music out to millions of people who would never hear it.”); Cory Doctorow, In Praise of Fanfic, Locus (May 2007), https://www.locusmag.com/Features/2007/05/cory-doctorow-in-praise-of-fanfic.html.

40 Book, film, television, and music recommendations may be the most familiar examples. Someone may be familiar with many works that are unrelated to their personal tastes (e.g., DJ) but which they can recommend to others with different preferences.


42 See, for example, Neil Gaiman, Fair Use and Other Things, https://journal.neilgaiman.com/2008/04/fair-use-and-other-things.html (“My heart is on the side of the people doing the unauthorised books, probably because the first two books I did were unauthorised, and one of them, Ghastly Beyond Belief, would have been incredibly vulnerable had anyone wanted to sue Kim Newman and me on the grounds that what we did, in a book of quotations that people might not have wanted to find themselves in, went beyond Fair Use.”) Note that even where a creator may lose their objectivity when their own work is involved, they generally can recognize when they (or their artist friends) have engaged in a behavior themselves, which is a measure of how common / reasonable an action is.

43 Assuming that it is not the artist’s own work being used nor the user’s use being judged. Objectivity is typically lost once one has a personal stake in the outcome.
mind, it should be evident why many activities, when not-for-profit, have not historically been considered infringement. These uses are, in effect, the achievement of the ultimate goal of copyright – societal development and growth from access to and sharing of information. To enforce a copyright owner’s control rights where use is a natural outgrowth of access would stunt the progress of arts and sciences instead of advancing it.

**Incidental Uses**

There are certain types of copyrighted works in which there is an implied grant to engage in activities described in §106 as belonging to the author. Though the uses in this section could also be described as reasonable, their characteristics give them a notable distinction. Incidental uses are those without which legitimate access to a work loses meaning or utility.

Forwarding an email, for example, is a common practice both in and outside of business, intended to provide the recipient with sufficient context to understand the thread or a related request. It is neither practically possible nor socially beneficial to bar reproduction and distribution without authorization. Even if governments were so unwise as to treat forwarding emails as actionable copyright infringement (even if continuing to require registration before suit), it is unimaginable that users would be deterred. Any users trying to comply would find effective communication much more challenging than those who do not, creating automatic incentives to flout the law. Another example is where one captures artwork or architecture in the background of photos or videos taken in public spaces. Even where the video may be taken by a documentarian for a film that will be sold, the capture of copyrighted works is incidental, an unavoidable side effect of those works occupying public spaces. As with email, making such captures illegal would be both practically impossible as well as an impairment to daily life activities.

Two less common examples can illustrate how such uses are present not just in popular activities but everywhere. Consider a band or orchestra’s copying, distributing, and marking up sheet music (e.g., adjustments needed for missing instruments) to/for its players. It would be impossible for the band to play well synchronously without such coordination. Even if a license for public performance does not explicitly give the licensee the right to copy or amend the work, the type of copying, distributing, and creation of a derivative work pre-performance described is essential to use. Similarly, a builder having legitimately acquired an architect’s plan may well modify it during construction, whether for general functionality or to accommodate the

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44 This assumes that it does not come with prohibition against sharing, such as the standard language lawyers add to their emails to protect privilege.
occupant’s request (e.g., wider doorways to accommodate a particular type of disability), both practical and necessary actions incidental to use.

Caching, load balancing, and copies that facilitate access to content that someone owns or has legitimate access to fall into the same category. The copies are made to use the materials for their primary purpose. Caching merely speeds up access; load balancing ensures consistent access; and converted copies allow a buyer to continue to access content even if the format in which it was originally bound is no longer useful. The copies made in these cases are intended only to facilitate consumption and reasonable use of content by someone who already has access, whether that someone is acting in private or as an employee of a for-profit company. After all, when acquiring a copy of a copyrighted work, what the actor intends to acquire is the substance of the work, not the format or delivery from a specific server. Each of these tools simply perpetuates access that has been legitimately acquired; they just deliver it in a more useful manner.

A for-profit actor is no less protected than any other user in these uses because their actions are not commercial in nature. Contrast this with use that sells someone’s emails without their consent or that takes cached copies of images and sells those without the artist’s authorization. In both cases, the purpose of sale is unquestionably for-profit, making money from the unauthorized selling of access of another’s copyrighted works to others.

Why Does the Commerciality of a Use Carry Disproportionate Weight in Infringement Cases?

Under an economic theory, it would be hard to understand why certain activities causing the same market impact can be seen as fair when used not-for-profit as compared to for-profit use. If the economic harm is the same, why isn’t the outcome the same? The common interest in the potential public access to knowledge makes the differing results comprehensible. Several elements factor into this analysis, so each will be taken in turn.

In contrast to the examples above, commercial use is not a natural outgrowth of consumption. It is not undertaken to consume or interpret the work; it is not about creating personal connection with a friend or a community using the work’s substance; it is not necessary to the use of a work; it is arguably not even about sharing knowledge, as commercial interest in sharing the work resides entirely in its potential to produce income directly or indirectly from its use.

45 In many cases, municipal codes will require the final plan to be approved by an architect, so the architect would remain involved in alterations, but this requirement will vary from location to location.
Therefore, government interest in protecting commercial use under copyright extends only insofar as it facilitates the common good of advancing the potential for information sharing. An author who chooses creative work as a profession is more likely to continue in the work if they can successfully make a living at it. Since a publisher is unlikely to pay an author for their work if other commercial entities can sell the same work without such payment, copyright will protect an author’s contract with the publisher for exclusive commercial distribution (or a subset of such distribution). The protection is aimed at the author and the public, giving the former leverage to negotiate with distribution providers with the goal of making their work available to the latter. (This leverage was particularly meaningful in times when distribution was costly and cumbersome, as commercial distribution would have guaranteed a wider audience than other means).

A commercial publisher benefits from the protection, in that once they contract with the author for use, they can exclude others from selling the work. But, copyright is unnecessary to encouraging the publisher to meet its role in the furtherance of the common good, as was demonstrated in the earlier section, where publishers thrived despite the majority of their catalogs being unprotected by copyright. Publishing and distributing works increase public access, and a commercial publisher is naturally incentivized to do this by the market. Profit provides the incentive for publishing; its revenue flows from how successfully it acquires desired content and markets that content for sale.

Unauthorized commercial use, then, fails both prongs of a knowledge-based copyright test, which is why copyright is designed to counteract it. Without the ability to control commercial exploitation of their works, not only would some authors be reluctant to make their works publicly available (as noted by Barlow), but out of necessity to make enough money to cover living expenses, the lack of protection would force would-be authors to invest less time on knowledge creation and more on money-generating non-knowledge-creation activities. In the commercial arena, copyright protects authors from unjust enrichment, and in doing so, makes knowledge creation a viable profession.

When someone sells access to someone else’s copyrighted work without authorization, the for-profit aspect creates a barrier to information sharing by requiring payment for access, and simultaneously deprives an author of their right to control publication of their work (i.e., harming knowledge creation). It is freeriding, usurping the potential for profit that was reserved to authors as a reward for knowledge creation to a business that had no role in creation, and it carries none of the societally beneficial effects of reasonable or incidental activity.

46 See historical section at the top, paragraphs on piracy.
47 That a publisher may be able to maximize profit through the use of copyright is not the same as saying that government copyright must protect publishers to reach the common good of potential public access to knowledge.
The facts surrounding the Harry Potter Lexicon lawsuit illustrate this aspect best, where a fan-written encyclopedia of Harry Potter’s world had been freely available online for years, both praised and used by Rowling and her publishers as a reference source. The publishing of content from that same encyclopedia for profit, though, was immediately opposed by copyright holders and was ultimately found to have infringed on copyright.\textsuperscript{48} Both the free and commercial versions had the same market effect; if anything, the online version, which was twice as long as the commercial version, would have had a greater market impact. The Lexicon, both online and in the commercial version, contained both new knowledge (e.g., analysis and summaries) as well as significant text taken verbatim from the original books, sometimes displayed within quotation marks quotes and sometimes without.

The free Lexicon neither claimed ownership nor financial credit for the author’s expression. The same creation, now sold instead of freely shared, ties profit directly to the author’s expression and to plagiarism (even where unintentional, as some of Rowling’s language was used without quotations).\textsuperscript{49} Generally, the spread of knowledge relies on users appreciating the information they have received and perpetuating it, but it does not depend on making money from the author’s specific expression. The commercial form of the Lexicon was not about making the original author’s work more accessible (as the online version had already done that), but rather about profiting from the creator’s specific expressions. It was the profit aspect of the encyclopedia, tied to the heavy reliance on the original author’s copyrighted words, that made its use a matter of unjust enrichment. (A later version, eventually published, cured those defects).

The use of a work can be for-profit even where it does not charge directly for access. For example, consider a business that plays music while people stand in line for merchandise or food. It is not charging users for access to the works, but its status as a for-profit entity creates a presumption that does not exist for other actors. The very purpose of a for-profit entity is in its name: its primary goal is to make money.\textsuperscript{50} When profit is an organization’s measure of success, every action is considered through that lens; the presumption is that, without a financial benefit in using a copyrighted work, the business would not do so. In the earlier example, the choice to play music for customers waiting in line is therefore presumed to be commercially driven (e.g., reducing the likelihood that customers will abandon the line by keeping them entertained). The presumption can be rebutted but serves as a rational starting point.

\textsuperscript{49} It did not help the defendant that they downplayed their original content by stating on the first page of the manuscript: “All the information in the Harry Potter Lexicon comes from J.K. Rowling, either in the novels, the ‘schoolbooks,’ from her interviews, or from material which she developed or wrote herself.” Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513, 525 (S.D.N.Y. 2008)
\textsuperscript{50} OED definition of for-profit : “Designating or relating to an organization operated to make a profit”
Note that employees within a for-profit organization retain many of the protections described in the Reasonable or Incidental Use sections, such as downloading an image from the web for an internal departmental presentation. It is only where they use work while acting on behalf of a for-profit organization for a business purpose (e.g., giving a presentation to an outside organization in an attempt to obtain a contract) that the question of unjust enrichment arises.

Why Income Generation Does Not Always Equal Commercial Use

Some courts and copyright owners conflate income or cost savings with commerciality, but the two are not identical. Many non-profit or end-user use of copyrighted works are not exploitative in nature, meaning that they do not profit from selling access to a work or authorizing other people to use the work.

When Income is Separable from an Author’s Expression

For example, in busking, a performer might sing copyrighted songs, audible to anyone walking by, but money (if any) dropped into the singer’s hat is in appreciation for the performer not for access to the music, much like a tip for a restaurant delivery is not for the food but rather the service. The song selection may contribute to that appreciation, but the tipping is separable from the copyrighted content. And since the activity occurs without prior notice at unpredictable public locations, there is no use of content for advertising. Similarly, an artist who posts their works, including fan art, on their own homepage might have a “donate” button somewhere on the page, allowing people to become their patrons, but again, payment is not required to access the works, and any contribution is to support the artist.

Compare this to someone who charges for access to the same performance or the same artwork; that is commercial activity because that person is selling to others access to those songs or that art. Access to the performance and the underlying songs is inseparable, impossible without payment, which is what makes the use commercial, and such use would cause the actions – whether done by a for-profit organization, a non-profit organization, or an individual – to be scrutinized for unjust enrichment.

When Use is to Further a Broader Societal Objective

Since copyright’s end goal is the potential for public access to knowledge, activities inherently centered on such have greater protection. In current copyright language, this category might be called “fair use” or “transformative use,” but both terms are inadequate to explain the breadth of protection. All uses in this section here involve significant contributions independent of the
author’s original expression. These activities allow people to better understand a work, to identify its strengths and flaws, to learn from it, or to see connections between it and the rest of the world. Such added value is not diminished solely because a for-profit actor engages in the activity.

There are five general categories in which such uses can be found:

First are the activities that are defined as being necessary to open discourse or an informed population. Section 107 explicitly names several of them: criticism, comment, news reporting, teaching, scholarship, or research. The purpose of use is not primarily to hear, read, or view an author’s expression; it is to use that work to understand something broader (e.g., the use of a poems to illustrate iambic pentameter) where society benefits from that added insight. For example, news organizations may gain advertising income during programs containing video, sound recordings, or photos copyrighted by others and used without their permission. The purpose of use is to explain, expand on, or illustrate a newsworthy issue, which meets the purpose of educating the public. The use of a work is in the larger context of a news story. Society benefits when everyone is aware of current events (e.g., damage caused by a natural disaster) whether or not the newscast receives advertising revenue for the program.

Second are uses that give a work a completely different meaning (e.g., parody). Even when commercial in nature, the use does not condition sales on the author’s expression but instead on a new expression. The two works may contain similarities (e.g., melody) but convey fundamentally different substantive messages. Note that sampling in many commercial cases can be easily distinguished from parody, as sampling takes the author’s actual expression and meaning, so if done for profit, it is charging for access to the author’s expression, even if only an abbreviated version of it.

Third are innovations that can be applied to copyrighted works. In order for any society to advance, it has to grow and evolve, and knowledge is a part of that development. Only by

51 Some might claim that in the cases where a class in on a specific artist -- Harry Potter, Taylor Swift, or Spielberg, for example -- the primary purpose is to hear, read, or view that artist’s expression. But if one is teaching about the artist, it is not merely about accessing the work, it is about analyzing it. The use in analysis -- listening or watching a clip in class to critique it -- is an educational use. In contrast, a teacher making copies of any artist’s work in full for their class for their personal collections is not necessary to instruction in the same way. This is where it should become apparent that the “reasonable person” test is a fairly accurate predictor in all uses. While students would probably be delighted to received free textbooks from their faculty, they are unlikely to think that a faculty’s acquisition of one copy comes with the right to make copies for all of their students.

52 Some may note that in musical parodies, the composition is unchanged; it is typically only the lyrics that change. However, a song is its own copyright, where lyrics and composition are inseparable. By changing the lyrics, the entire meaning of the song has changed; it is no longer using the artists’ expression but has turned it into something new. In sampling, the artists’ expression is kept intact for the portion sampled. Though other portions of the song may be original (and should be themselves protected by copyright), the portion sampled is unchanged.
understanding the wheel can one develop a wagon, and only by understanding a wagon can one develop more advanced vehicles, and so forth. Innovation that aims to help society or its people move forward therefore is also protected despite its impact on copyrighted works. Equipment that creates the incidental copies described above (e.g., DVR, automated text-to-speech technology, format conversion) are such innovations.

Even when done for profit, the purpose of innovation is not to sell unauthorized access to copyrighted works. It arguably is not about the substance of any copyrighted or published work at all, as the function of innovation has independent value and purpose. As examples, income from selling speech-to-text software comes from its accuracy in translation; income from selling a DVR is not based on the programs it records but rather its capability to record. These “uses” are not technically uses of a copyrighted work because the application, device, or other technology does not require a copyrighted work to operate. The end-user decides how to deploy the technology in a given instance. How a user chooses to use the technology might provide evidence of infringement on the user’s part, but the technology itself cannot be held to infringe.

Fourth are uses that facilitate discovery (e.g., database, news feeds) or non-substantive analysis of works (e.g., data analysis tools like n-gram). Even where the activity is undertaken for profit, the use is not to profit from an author’s expression of content. A database’s income, for example, assuming the works are not available full-text, comes from the effectiveness of the search engine; a news feed showing snippets and linking to the full-text gains its income with how well its search engine works, its effectiveness in displaying and organizing snippets, and how easily it enables users to find the original source; data analysis tools make money not from the substantive meaning of any copyrighted work but from works’ relationship to the external world (e.g., identifying when a word became popular). Where such a tool also provides full-text of the underlying works without the copyright owner’s authorization to those other than a legitimate user and other than in the context of a reasonable or incidental use, there are multiple uses at play: the display of full-text versus the tool that helps to identify or use a work to which one has legitimate access. The second is protected; the first may not be.

53 This is differentiated from selling a prerecorded audio recording because in the latter case, the actor is selling access to content.

54 Note that there is also a difference between the technology itself and how a company uses it. Sony, for example, was simply selling a home recording device; what was recorded or shared was entirely out of its hands. In contrast, ReDigi used its technology both to copy and distribute specific copyrighted works, thereby involving itself in the use of copyrighted works in a way that Sony did not. The technology in ReDigi itself didn’t necessarily infringe; it was how ReDigi used it that made the particular copies and distributions infringement. Napster and other peer-to-peer file sharing companies sit somewhere between Sony and ReDigi. The technology that they created would be immune from copyright infringement. They were not involved in the choices of what to share, upload, or download, but some knowingly generated income from access to infringing works, failed to comply with the usual takedown rules, and deliberately encouraged infringement by others, which makes their actions (not the technology) the basis for contributory infringement. See for example Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 915, 125 S. Ct. 2764, 2768, 162 L. Ed. 2d 781 (2005)
Fifth are minimal uses where only a small part of the work is used and the use is situated in an independent expression (e.g., commercial outlines). These are protected even if they capture some of the author’s expression (e.g., quotes), do not serve one of the purposes listed in 107, and are sold. A summary need not add commentary or criticism, and yet, because the resulting creations are not primarily about selling access to the author’s specific expression of content but about selling the summarizer’s expression of content, it escapes copyright’s censure. If done not-for-profit (e.g., someone taking notes and including quotes in their notes or academic paper), the activity would be a reasonable outgrowth of consumption, but again, commercial use is not a normal outgrowth of consumption, which is why this activity is listed separately here, to show why it would be protected despite commercial deployment.

Why Some Non-Commercial Uses Lose Protection

If the potential for public access to knowledge carries such weight in knowledge theory, then one might logically ask: why aren’t all non-commercial uses allowed? After all, permitting widespread non-commercial use would foster the fastest and widest spread of information. Copyright’s prohibition of such sharing though can be explained through the balance of knowledge creation and knowledge sharing. As noted above, in order to incentivize authors to release their works to the public, some protection against unjust enrichment and misuse has to be provided. Both commercial and non-commercial uses may deliberately misuse a work. (Note: “misuse” in this article is used in layman’s terms, not as the legal term of “copyright misuse.”).

Even with non-commercial uses, there are recognizable lines between reasonable and unreasonable uses. Reasonable uses are those that are natural outgrowths of access and consumption. In contrast, would any reasonable user believe that buying a movie ticket entitles them to make a bootleg copy of the film and post it online? Or that buying a textbook means that they can make copies for their entire class? Or that licensing a play for performance means authorization to insert new scenes?55

A user may well believe that copyright should not exist or should not be as restrictive as it is and post a work in full as a gesture of such protest, but a disagreement with the principles of law is distinct from believing that their use is a reasonable outgrowth of legitimate access and aligned with the common interests underlying copyright. A user’s posting of a work for the world to access without limitation and without the copyright owner’s authorization has no

55 That’s not to say that this couldn’t be negotiated as part of a license, or that someone using the extra scenes as critical commentary (and clearly noting them as such) would be unable to justify them under a different principle. But the question here is whether a reasonable person would think that a standard license for public performance includes such a right.
rational relationship to their use and consumption of the item. There is no actual “use” of the work in the substantive sense. The poster is not trying to listen, watch, or read the substance itself; they are not seeking to explain, teach, or communicate the substance of the work to another; and the person posting is not using the work for the purpose for which access was obtained. As much as commercial freeriding disincentivizes authors from making their works available to the public, so does posting the work in this manner.

Other types of uses falling into the misuse category include plagiarism, deep fakes, and sending private photos to revenge porn sites. Again, using a reasonable person standard: a reasonable person reading a book will not think that gaining access to the book translates to a right to claim the author’s words as their own; a reasonable person buying access to images will not think that the purchase entitles them to manipulate those images to mislead others into believing that altered forms were the originals created by the author; and a reasonable recipient of nudes from their partner will not think that receipt included the right to redistribute the picture to others.

Why Government and Cultural Institutions Have Special Statuses

Under copyright, governments have fewer rights than individual or corporate authors, and libraries and archives have more use rights. The common good of public access to knowledge explains the special treatment in both instances.

Governments, at least those described as democratic or republican, are defined as representing the people, where the public is the ultimate authority. Government officials merely serve the public. As such, it makes sense that the people “own” the products of the government, and there is no need for government protection or authorization to share something owned with oneself. The government will create regardless of any copyright incentives, so giving any entity copyright in the works created has greater potential to reduce sharing than increasing it, and its documents are most likely to survive history if they are openly available to anyone to use and preserve. [Note: this does not prevent the government from restricting access to information based on other principles, such as national security, but that is an independent analysis.]

On usage, cultural institutions such as libraries, museums, and archives have greater rights than the average individual or organization because their missions are defined by societal benefit. They have long-recognized societal responsibilities than no individual or other

56 17 USC 105. States do retain more copyright ownership rights, though efforts to prevent the public from access government generated data has been struck down. Georgia v. Public.resource.Org., Inc, No. 18-1150, 590 U.S. ___ (2020).
57 See sections 108 and 109.
organizations have: to provide access to information to communities and to preserve that access for future generations. That greater societal obligation justifies their special status and their expanded rights under copyright. What might be unreasonable for an average user to do may be reasonable for a library, archive, or museum to do given their community or public responsibilities.

Why Non-Human Generated Works Are Not Protected by Copyright

Since copyright is only effective in protecting the creation of and the sharing of works if its creators and users are incentivized by its contours, it would be completely ineffective in motivating non-humans that definitionally have different (if any) motivations.

Artificial intelligence. A computer is not motivated by anything. It does what it is programmed to do. It reaps no benefit from control or from the potential of monetary rewards, and it is not injured in any way by widespread, uncompensated use. Further, if copyright were to be recognized in these works, it arguably would be counterproductive to human productivity, as it would encourage replacement of human creativeness with automated efforts. Where human effort continues to contribute to a work, it remains protectable. For example, those who use AI as a tool (e.g., providing alternative wording) to facilitate their own creation may still claim copyright in the work that they produced, much as they do today even after editing by another; and the programming underlying AI (if written by humans) is still protected, so those creating it are still rewarded for releasing it for public consumption.

Is it possible that lack of protection might deter people from releasing wholly-AI-created works to the public? Yes, but it is hard to imagine a situation in which that is a loss to humankind. If a work is entirely generated by AI, its creation is not limited to one person. Anyone can generate the same or better by using the AI themselves. It is access to the AI that is in the common interest, and that remains protected by copyright.

Of course, as AI evolves, it may not be possible for anyone to tell the difference between human-made and computer-made works unless the person releasing the work admits it. In such cases, though, they become personally responsible for the problems with the work (plagiarism, infringement, defamation); by claiming ownership, they gain not only its benefits but its liabilities. One cannot both claim the right to profit from ownership but then disclaim responsibility it when it does harm to another.

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Animals. An animal also is not incentivized to create more by copyright recognition nor will it be deterred from creation if its works are exploited commercially by others without its permission. In fact, one might argue that it is more dangerous to society to protect such works than not, because it would incentivize humans to harass animals to create works that they can then monetize. Increased human and wild animal interaction increases the chances of harm not only to the animal but also the human. Again, the owner of an animal has other options (e.g., plagiarism) outside of copyright to prevent anyone else from claiming the work as theirs and for monetization (e.g., not posting the work but negotiating payment with a company for first release. While this may not allow them to profit during a copyright term, it still presents opportunities for income.)

Knowledge and the Fair Use Factors

Reviewing the analysis above, one can see the relevance of the four fair use factors in the furtherance of common good, though the analysis does not mirror that described by courts. The factors themselves each are essentially aspects of the question: how (if at all) does the use advance society’s interest in knowledge creation, seeking, and sharing? In some cases, only one factor would be needed, and in others, the four factors might only be the start of the inquiry.

The purpose of use asks whether it is primarily intended to serve a societally beneficial function, profit from an author’s expression, or misuse a work? If the answer to the first is no and yes to the third, no other factors would need to be considered; the use would not be fair. If the answer to the first is no, but to the second is yes, some other factors may have relevance (e.g., how much of the author’s expression was used).

The character of use is considered in combination of the nature of the work. Instead of focusing on how creative a work is, the nature of the work is relevant because reasonableness necessarily depends on the character of the work. For example, works can be of a type where copying is a necessary (e.g., form) or expected (e.g., retweeting) part of use, and others can be of a type that makes reasonable uses more restrictive (e.g., unpublished diary).

The character of use is the other logical half of the “reasonableness” analysis. For instance:

60 This has to be an objective test, not a subjective one. Bowlderization, for example is often held out as socially beneficial, but that’s a subjective assessment. Individuals could do this as a reasonable private use, but once commerciality added, the reasonableness argument disappears and the question is whether the activity can pass an objective test of societal benefit.

61 Unfilled forms are often described as not copyrightable, but some contain sufficient originality and creativity that portions could qualify (e.g., Mad Libs).
• if someone owns a copy of a work, they would have more recognized reasonable uses than a non-owner; a buyer of an 8-track tape can reasonably convert this into a current format for their own use, but it would not be equally reasonable for someone borrowing the tape (or the converted form) to make and keep their own copy from it\textsuperscript{62}.
• a reproduction that adds uncontrolled copies to the market (e.g., bootleg movies on a pirate site) would be seen as qualitatively different from reproduction that facilitates use by someone with legitimate access (e.g., a user condensing a DVD’s scenes to their favorite clips for their own personal viewing).
• using a copy for preservation is qualitatively different than using it to share with others; reasonableness allows for granular analysis, where each use of the same work by the same person or organization could be evaluated separately.

Where the activity is a reasonable outgrowth of access or consumption of the work, the use is fair; no other factor needs to be considered. In some cases, though, the “reasonableness” of any action may not be apparent without knowing how much of the author’s original expression was used or whether the activity is commercial.

Therefore, the amount and substantiality of a work may be useful in assessing reasonableness given the purpose and character of use. For example, where it would be reasonable for a newscast to use the entirety of a photo of a natural disaster to support its reporting, broadcasting an entire documentary about a natural disaster is unlikely to be viewed in the same light.

The market effect factor only applies where the use is for-profit and not reasonable or incidental. In other words, it only applies where a case could be made for unjust enrichment. Relevant questions would include: Why were these particular works selected? What benefits does the use confer solely on the actor? The two questions may be interrelated. After all, if a work is chosen for its popularity and potential of attracting customers for the for-profit’s business, this demonstrates a conscious choice in exploiting a work for the direct or indirect purpose of the business’ profit.

Why Transformative Uses Do Not Guarantee Immunity

\textsuperscript{62} Note that “reasonableness” within knowledge theory has applications beyond the substance and use of copyrighted works. For example, even if a use cannot avail itself of a fair use (or other) defense, knowledge theory would be unlikely to support statutory damages in situations without broad actual or potential harm, because they should only be used where they are aligned with societal interests in knowledge creation or sharing. Deterrence is not that persuasive under copyright theory when the mechanism used for deterrence also chills the progress of science and useful arts. For discussion of the societally harmful effects of copyright statutory damages, Pamela Samuelson, Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 WM. & MARY L. REV. 439, 441 (2009)
The knowledge theory also explains why transformative works may be held to be infringing when used for commercial purposes. One might recall that the Lexicon was transformative in purpose, as an encyclopedia does not serve the same purpose as novels. Reading an encyclopedia, no matter how much of the author’s original expression is taken, still would not have conveyed the same expression as the original books. While the court did find that in relation to two titles, the use was not transformative, the defendant could have modified the book to drop any references to those two works, rendering the entire work transformative.

However, in the particular iteration of the Lexicon in question, so much of the author’s original expression was taken that it could still be considered unjust enrichment, profiting from heavy use of the author’s expressions instead of new expression. In contrast, an encyclopedia of Harry Potter that did not contain any quotes or contained far fewer could (and did) pass muster because it does not rely on the original author’s expression for sales but rather on independent expression. (Independent in the sense that the exact words used did not come from the original author but the encyclopedia’s author).

Conclusion

Both reasonable use of and innovation using copyrighted works naturally will impact economies, from creating them to remaking them to forcing them into obsolescence. If economic impact is the primary measure of whether a practice should be protected by copyright or not, and only one side of the balance can claim the type of economic value that counts, then using an economic measure is really about suppressing change, or at least any change that has the potential of reducing an income stream of the copyright holder, even if the change is logical and creates significant societal good.

If one looks at copyright as a whole, it is apparent that copyright’s advancement of the common good was intended to spur societal development and evolution. It has successfully done so in many instances: radio, television, and home recording each created new revenue streams and markets; internet access has remade delivery of all manner of copyrighted content, from enabling online ordering and delivery of books/music/movies, to facilitating granular sharing (e.g., sharing photos only to those tagged as friends), to allowing print-disabled customers greater access to published materials; streaming, peer-to-peer technologies, and social media have hastened the demise of some industries (e.g., video rental stores, photo processing companies); software and online markets have remade the process of creation, from easing

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64 Note: this is particularly troubling because, in real life, a reduction in one stream can be offset by increases in other streams. However, the economic analysis focuses only on a single use and any potential reduction without considering the wider, more accurate picture.
generation/editing (e.g., recording changes, note taking apps like Evernote, availability of home video/sound editing tools) to expanding publication options (e.g., self-publishing platforms, blogs) to enabling the greater sharing of knowledge between creators.

Some might claim that the examples do not involve economic impact to the copyright owner and therefore are irrelevant. There are two responses to this. The first is that copyright owners are impacted by all of these changes, even if not directly through income. Three examples: word processing applications reduce a creator’s costs; the ease of online distribution decreases a publisher’s costs such that they could invest those freed funds in their creators (though obviously, they are not compelled to do so); the replacement of stores like Blockbuster with streaming has the potential of impacting creator income both positively and negatively, as it can boost income by expanding viewership\textsuperscript{65} or decrease it by not paying authors for free trial periods\textsuperscript{66}.

The second response underscores the point that this paper seeks to make: there are many benefits to copyright beyond the financial and beyond the copyright owner, benefits that outweigh any economic value of copyright. Copyright cannot possibly be solely about the economic impact on a creator; otherwise, all innovation around copyrighted works outside of commercial activity would stop. To restrict oneself to an economic analysis where the only beneficiary supported is the copyright owner is to misunderstand the entire history of copyright.

If copyright is intended to evolve, this means that both its creation and use are expected to change over time without being impeded by holding copyright applications static. Economic theory freezes copyright application, at least in regards to the specific income stream being assessed.

Adjusting the perspective to one of the common good more closely aligns with copyright’s history and would more definitively resolve copyright’s conflicts. It would not eliminate disputes, as gray areas would exist under any theory, and it would occasionally argue for different end results or remedies in past cases, but it reduces the chilling effect currently caused by the incoherency of the economic theory of copyright.

Collectively, people tend to talk about copyright as if it is the primary principle and the exceptions in the code its limiters. But in reality, copyright itself is a limitation to much broader

\textsuperscript{65} See for example, Wynne Davis, Streaming outperforms both cable and broadcast TV for the first time ever, NPR (Aug. 18, 2022), https://www.npr.org/2022/08/18/1118203023/streaming-cable-broadcast-tv

\textsuperscript{66} An example that was widely covered in the news was when Taylor Swift pulled her work from streaming platforms in objection to the policy of not paying rightsholders during free trial periods. John Constine, Apple Says “We Hear You Taylor Swift”, Will Pay Musicians During Free Trial, TechCrunch (June 21, 2015), https://techcrunch.com/2015/06/21/apple-music-free-trial/
equitable and natural rights to consume, use, and share information. Much of those pre-existing rights survive copyright protection, and it is only through examination of copyright’s purpose that this truth is recalled. Copyright was intended to “promote the progress of science and the useful arts,” but forcing every use into an economic analysis instead limits progress. By readjusting our frame of reference to knowledge, society gains a clearer view of what current activities are aligned with copyright’s initial purpose and which are not.