Copyright, Property, and the Right to Deny

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COPYRIGHT, PROPERTY, AND THE RIGHT TO DENY

TIMOTHY J. BRENNAN*

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I. INTRODUCTION

One of the leading controversies in copyright law has been whether the law can be used by a copyright's owner to prevent others from using what is effectively protected information. A number of recent cases bring this controversy to our attention. In *Salinger v. Random House, Inc.*, the Second Circuit Court of Appeals allowed author J. D. Salinger to prevent Ian Hamilton from reproducing Salinger's letters in a planned biography. The Eleventh Circuit supported the right of a television station to prevent a "clipping service" from selling taped parts of the stations news reports regarding the service's clients. State and federal courts apparently have conflicting views regarding the right of the Chicago Board of Trade to open a futures market based upon the Dow Jones New York Stock Exchange indices. In addition, the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.* refused to allow a telephone company to use copyright to deny a competitor the right to reproduce the alphabetical residential listings ("white pages") in its competing classified business advertising directory ("yellow pages").

These cases, in different ways, raise the issue of which standards a copyright holder can use to suppress access to information. In *Salinger*, the author was able to use copyright to assert a right to privacy that outweighed the economic and professional interests of the biographer and his publisher. In principle, copyright allowed Salinger to put his privacy interest and perhaps his future economic interest in the letters ahead of the interests of future readers and scholars who wish to know the beliefs and events that may have influenced Salinger's writing. This use of copyright is ironic because the letters themselves were publicly available, having been donated by their recipients to libraries open to the

2. Id. at 92.
4. Dow Jones & Co. v. Board of Trade of Chicago, 546 F. Supp. 113 (S.D.N.Y. 1982). The court denied Dow Jones's request for a preliminary injunction to stop the Chicago Board of Trade from creating futures contract markets based on the Dow Jones stock averages. However, in Board of Trade of Chicago v. Dow Jones & Co., 456 N.E.2d 84 (Ill. 1983) (Simon, J., dissenting), the Illinois Supreme Court held that the Chicago Board of Trade could not institute such markets without Dow Jones's permission.
6. In rural areas where the residential and classified business advertising directories are not thick, they are usually bound in a common volume. Firms who want to offer competing "yellow pages" directories claim that their products will not be kept and used by consumers unless they are allowed to include "white pages" as well. Id. at 1286.
public.\textsuperscript{7}

Even the \textit{Feist} case, in which the ostensible copyright holders lost, raises potential controversies. In this case, the Rural Telephone Service Co. attempted to use its control over otherwise freely available residential telephone listings to exclude yellow pages competitors from its local markets.\textsuperscript{8} Had Rural Telephone's right to control reproduction of the residential listing been protected by copyright, it could preempt at least some competition in advertising.\textsuperscript{9} However, Rural Telephone did not lose because it intended to use copyright to monopolize classified business directories by exploiting its power over the right to reproduce residential directories. Rather, it lost on a simple issue: the alphabetical list of telephone subscribers was not copyrightable because the facts were "discovered" rather than "authored."\textsuperscript{10}

These cases bring to mind a potential tension. On the one hand, our common intuitions regarding the proper purposes of copyright include the principle that copyright is not intended to establish control over information per se. On the other hand, these cases indicate the ability of copyright holders to control access to the embodied information to a degree constrained only by the inherent copyrightability of the material itself,\textsuperscript{11} the "fair use" doctrine,\textsuperscript{12} and the time limitations of copyright.\textsuperscript{13}

\textsuperscript{7} Salinger, 811 F.2d at 93.

\textsuperscript{8} The "freely available" qualifier is important. If local regulators allowed Rural Telephone to charge consumers (or "yellow pages" competitors) the monopoly price for its listings, it would have much less economic incentive to deny access to potential competitors in the market for classified business directory advertising. For a discussion of the relevant economic principles, see Timothy J. Brennan, \textit{Why Regulated Firms Should Be Kept Out of Unregulated Markets: Understanding the Divestiture in U.S. v. AT&T}, 32 ANTTRUSTR BULL. 741 (1987).

\textsuperscript{9} I avoid here the potentially thorny issue of whether "yellow pages" directories constitute a relevant market under the antitrust laws, e.g., as specified most recently by the Department of Justice and Federal Trade Commission, \textit{Horizontal Merger Guidelines}, 4 TRADE REG. REP. (CCH) \textsection\textls{13,104} (1992).

In Dow Jones & Co. v. Board of Trade of Chicago, 546 F. Supp. 113 (S.D.N.Y. 1982), the federal court found that Dow Jones lists were copyrightable but that their value was not harmed by any potential "copyright" violation by the Chicago Board of Trade. The court did not consider whether the actual trading of stock index futures caused harm to Dow Jones. Subsequently, however, the Illinois Supreme Court found that the Chicago Board of Trade's futures contracts constituted "misappropriation." Board of Trade of Chicago v. Dow Jones & Co., 456 N.E.2d 84, 89 (Ill. 1983).


\textsuperscript{12} 17 U.S.C. \textsection\textls{107} (1988).
As Pamela Samuelson has described this process in other legal contexts, copyright transforms "information into property," with concomitant rights incident to possession including the right to exclude others, extract profits, and alienate interests.\(^{15}\)

A further aspect of this tension, presented most clearly by the federal Dow Jones case and perhaps Salinger, was that the copyright holder was asserting rights to protect uses that they themselves probably had no interest in pursuing. Dow Jones was not in a position to open a futures market in equity indices, and has not attempted to profit by licensing the right to its stock indices to other markets.\(^{16}\) Similarly, if Mr. Salinger’s protestations regarding privacy are taken at face value, he was not withholding his letters to publish them in his own biography. From an economic viewpoint, the exclusive control entailed by copyright is justified to the extent that one views copyright as protecting the economic incentive to market intellectual property according to the creator’s intent. This rationale applies less well, if at all, to uses that do not compete with those uses for which the creator intended to derive compensation. Hence, these uses lie outside the context of the classic copyright policy trade-off in which copyright grants a putative monopoly so to give a creator an incentive to create. Yet, a line may be crossed between protection of earnings capacity and censorship. Consequently, one might argue that copyright protection ought not be granted to these noncompeting uses and that copyright holders have no right to suppress in those settings.\(^{17}\)

13. Id. § 302.
14. Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365 (1989). I say "other legal contexts" because the two cases she studies that suggest this signal are not copyright cases. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), involved Monsanto’s claim that the Environmental Protection Agency’s use of Monsanto’s data violated Monsanto’s fifth amendment rights. See Samuelson, supra, at 375. Carpenter v. United States, 484 U.S. 19 (1987), involved a criminal fraud case in which Carpenter and others traded on information not yet, but about to be, published in the *Wall Street Journal’s* “Heard on the Street” column. To gain a fraud conviction, the government had to establish that this information was taken property. See Samuelson, supra, at 383-84.
15. 1 SMH LAW SCHOOL SUMMARIES: REAL PROPERTY 77 (1990) [hereinafter REAL PROPERTY].
The purpose of this paper is to explicate this tension, with the hope of better understanding its causes. First, this paper presents three rationales—legal, economic, and social—that seem to underlie the intuition that copyright should not be used to grant property rights over information (including all forms of intangible expression). However, arguments against using copyright to give owners of information the kind of discretion over access that owners of tangible property have should color copyright law instead of property law only to the degree that they distinctively apply to copyrightable material. To see whether this distinction is valid, this Article then examines the philosophical and economic underpinnings of the two leading types of justifying theories for property rights: the "intrinsic value" approach, as most prominently associated with John Locke, and the utilitarian or "instrumental value" approach suggested more recently by the work of Ronald Coase. These theories in turn will help us understand the economic rationales for exclusive rights in property per se and in copyrighted work in particular.

The central issue here is whether copyright goes too far in turning information into property. In elucidating the comparison between the treatment of property in general and copyrighted work in particular, it should be noted that non-copyrighted property rights are often abridged. Owners of an asset are not always free to set the terms and conditions under which others are allowed to use it. This Article explores three examples of these restrictions—zoning, common carrier regulation, and civil rights laws. These examples are chosen to illustrate the possibility that, as far as normative justifications are concerned, the same concerns that may lead us to question the extent to which copyright establishes effective property rights over information may also play a role in naive property contexts as well.

To evaluate the exclusivity rationale's applicability in markets beyond those originally intended to be reached by the copyright holder, such as Dow Jones and Salinger, this Article next reviews the "noncompeting uses" protection granted by copyright. In some cases, particularly where criticism is involved, an appeal may have to be made to the hypo-
thetical \textit{ex ante} contract structure employed by contractualist philosophers to justify arrangements for which \textit{ex post} acceptance may not be forthcoming.\textsuperscript{21} This Article will also identify similar examples under which an owner of naive property, e.g., a piece of farmland, has the right to suppress noncompeting and benign uses such as incidental trespass.

Establishing that these other uses are outside a copyright holder's intent may be easier said than done. Copyright holders may find it efficient to license some particular use and distribution rights to outsiders. The first step in bargaining over license fees will be for the copyright holder to deny that others have such rights. In addition, antitrust analysis shows that granting an exclusive license may be necessary to ensure efficient promotion and distribution of a work.

This Article concludes that concerns over whether information ought to be regarded as property focus on the wrong inquiry. Rather, the concerns regarding information as property should focus on the problems inherent in certain types of property. These problems may arise when certain factors are present, whether the interests protected involve property or information. This Article therefore concludes with a brief review of how the major limitations of copyright, copyrightability and "fair use" are consistent with a view that copyrighted work might generally be regarded as property.

II. THE TENSION BETWEEN COPYRIGHT AND PROPERTY

This Article begins by reviewing some of the underpinnings of the view that the burden of justification belongs on those who would support the creation of effective property rights in information through copyright. The case against treating information as property may depend upon a theory of the difference between information and naive property. The need for such a theory, however, depends upon a clear understanding of why there might be a tension between copyrighted work and naive property in the first place.

A. The "Legal" Objection—Copyright as an Artifact

A first source of tension between copyrighted information and naive property is that copyright looks like an artifact. It seems "natural" to own land or objects, and to exclude others from such use, while it seems "artificial" to apply those ideas to ephemera such as information. In particular, the definition of property seems to suit physical entities but needs

\textsuperscript{21} Recent prominent examples include \textsc{John Rawls}, \textsc{A Theory of Justice} (1971); \textsc{David Gauthier}, \textsc{MORALS BY AGREEMENT} (1986).
to be extended to fit the intangible expressions and designs protected by copyright. This tension evolved for two reasons; the first based on the distinction between the common law aspects of property and the statutory origins of copyright, and the second based on the limitations on ownership and alienability imposed under copyright statutes.

1. Common vs. Statutory Law

Some of this tension may arise from, or be reflected in, the differing origins of property law and copyright. Property is based on common law tradition, suggesting that property law evolved from the "bottom-up" to facilitate the interactions among individuals as economic and social needs arose. On the other hand, copyright appears to have been imposed by legal authorities upon the economy and society. Unlike common property law, copyright has been explicitly created, by constitution or statute. The Office of Technology Assessment described English copyright law as "a statutory right reflecting its origins as a privilege granted to government to achieve a particular public policy purpose." In short, the distinction between common and statutory law indicates that naive property rights are inherent in the workings of society, while copyright is something that would not be there but for an explicit public policy decision by a government.

The distinction between statutory and common law protection may embody an important philosophical difference that speaks to the "natural rights" standing of copyrighted work. According to Ronald Dworkin's theory of jurisprudence, there is a fundamental moral difference between the role of legislatures and that of judges. Dworkin argues that the judiciary's role is to protect individual rights, as interpreted according to the best political theory consistent with the origin and development of judicial decisionmaking. Dworkin has employed the metaphor of a

22. ECONOMIC FOUNDATIONS OF PROPERTY LAW vii (Bruce A. Ackerman ed., 1975) [hereinafter ECONOMIC FOUNDATIONS].
23. See U.S. CONST. art. I, § 8 ("The Congress shall have 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."). This led to a series of U.S. Copyright Laws of 1790, 1909, and most recently 1978. See 17 U.S.C. § 101-901 (1988).
24. In England, copyright was created originally through licenses associated with 16th and 17th century censorship laws, following the introduction of the printing press and the potential for wide dissemination and copying of expressions. INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 34-35 (Office of Technology Assessment (OTA) ed., 1986).
25. Id. at 36.
27. Id. at 82-90.
"chain novel" to describe judicial decision making, in which each judge
is to write a chapter that most understandably extends the prior story of
the law. Occasionally, doing so may mean that one has to decide that
recent chapters were out of line with the overall theme of the novel.

An important and perhaps notorious aspect of Dworkin's theory is
that the rights that the judiciary is supposed to respect and implement
are expected to prevail over the aggregate interests represented by,
among other things, economic efficiency or wealth distribution. Among the more persuasive arguments Dworkin makes in defense of his
thesis is that in hard cases, attorneys on either side argue in support of
their clients by attempting to show what moral rights are at stake, rather
than by showing what decision would best pass an algorithmic test. Decisions regarding efficiency or the satisfaction of interest-based claims
should be left to the legislature.

Accordingly, statutory law such as copyright is seen as a legislative
instrument created to further some efficiency or wealth interest. On the
other hand, property, as a common law creation, would find its rationale
grounded in the development and protection of moral rights existing
apart from these interests. Dworkin's theory thus supports a belief that
common law property is in some way connected with natural or funda-
mental rights, while the statutory information rights created by copy-
right carry no such credential. Thus, attributing common law property
rights to copyrighted work would give them a moral status that they do
not deserve—otherwise, we would have common law copyright.

2. Statutory Limitations on the Copyright

The statutory limitations set on copyright—the limitations on what
can be copyrighted, the right to exclude, and the length of ownership—
may support a belief that information is not property. Perhaps the most
significant instance of the first of these, limitations on copyrightability, is
the distinction between "fact" and "expression" that permeates copy-
right. According to this distinction, facts themselves are in the public
domain, e.g., Bill Clinton was inaugurated President on January 20th,
1993. It is only the expression themselves that are copyrightable, e.g.,

29. Id. at 158-62.
30. Id. at 161.
31. DWORKIN, supra note 26, at 197-201. This constitutes a key part of Dworkin's argument
against interpreting law as an instrument of legal policy. Ronald Dworkin, Why Efficiency?, 8 Hof-
stra L. Rev. 563 (1980).
32. RONALD DWORKIN, LAW'S EMPIRE 43, 412 (1986).
the *New York Times* story reporting President Clinton's inauguration. Thus, the scope of copyrightability seems to embody a viewpoint that information *per se* cannot legally be owned in the way that naive property can be.

A second kind of limitation seemingly unique to copyright is that the copyright statute defines circumstances under which the copyright owner loses control of the ability to exclude and alienate. These rights are usually central to the idea of property possession. The two aspects of the copyright law that set out these circumstances are "fair use" and "compulsory licensing." Under the copyright law, "compulsory licensing" refers to a specifically enumerated set of circumstances under which copyrighted work can be used without permission, with a statutory fee paid, directly or indirectly, to the copyright holder.34 These circumstances include retransmitting broadcast signals by cable systems, recording songs, and playing recordings over jukeboxes.35 "Fair use" is a less clearly defined right to use copyrighted work without compensation. Whether a use is "fair use" depends upon the purpose and character of the use (e.g., scholarship, news, or nonprofit uses), the nature of the work, the significance of the used portion relative to the entire work, and the effect of use on the value of the work.36

A third distinction between copyright and naive property is the time limit. This, admittedly, is materially less of a distinction than it used to be. Prior to 1982, a copyright was enforceable for twenty-eight years, once renewable, for a total limit of fifty-six years. While fifty-six years may seem like a long time, it is less than the time much property stays within a family, if not owned by a single individual. Moreover, the present value of property rights existing more than fifty-six years into the future can be substantial.37 However, under current law, the general term of a copyright extends to "life plus fifty" years, with a default lifetime of seventy-five years from first publication.38 This limits the attenu-

34. Payments for recording songs are paid directly to copyright holders. Payments for playing recordings over jukeboxes and cable retransmission of broadcast signals are collected by the Copyright Royalty Tribunal and distributed to claimants nominally representing copyright holders. 17 U.S.C. §§ 111(d), 115(c), 116(c) (1988).

35. *Id.* §§ 111(d), 115(a), 116(b). The jukebox compulsory license now applies only if the Copyright Royalty Tribunal determines that negotiated licenses result in a "quantity of musical works not substantially smaller" than the amount "performed" on jukeboxes prior to March 1, 1989. *Id.* § 116A.

36. *Id.* § 107.

37. For example, at a real discount rate of only 2%, $1 fifty-six years from now is worth a little over 32 cents today. To put the mathematics another way, if someone were to earn $1 per year in perpetuity in royalties from use of a copyrighted work, 32% of the present value of those earnings would be embodied by the returns after the fifty-six years of expiration.

38. 17 U.S.C. § 302 (1988); see also WILLIAM S. STRONG, THE COPYRIGHT BOOK: A PRACTI-
ation of the copyright, although it need not eliminate it altogether.39

These distinctions between copyright and property draw out the conflict between the common law and statute law conceptions in a somewhat intriguing way. The view of copyright portrayed here is that it is a "but for" grant by the state, creating rights where they would otherwise not have existed. Among many commentators, this places the policy burden on the advocate for copyright.40 As Wendy Gordon has observed, "hostility to copyright has a long and honorable history."41 The argument underlying restrictions on copyrightability of facts or ideas, creating "fair use" rights for news and educational uses, and limiting terms, is perhaps that these steps mitigate a distasteful, if not unfortunate, creation of an exclusionary right.

However, these very restrictions show that copyrights are attenuated when compared to naive property rights, which generally lack restrictions on applicability, excludability, and duration. A simple example from the patent side of intellectual property law may bring this out. Suppose Ms. A owns a farm, and on this farm she has a pond. Dissolved in this pond water, for some peculiar reason, is a chemical that grows hair on bald men. Suppose further that this chemical is found nowhere else, and chemists are unable to synthesize it. Absent some state action—perhaps following confiscatory legislation promoted by the American Association of Bald Men—Ms. A has a right to make that chemical available under the terms and conditions she pleases. In contrast, consider Ms. B, who owns a pharmaceutical laboratory. She spends tens of millions of dollars and finds a chemical that cures baldness. In contrast to Mrs. A., under current patent law Ms. B. has a patent with a short seventeen year life, which is granted only if she elects to disclose the nature of the chemical.

CAL GUIDE 35-37 (1981). The "seventy-five year" rule applies from the date of first publication (a hundred years from creation) when it is not known whether the creator is alive, or for work-for-hire, i.e., work created by one under contract to someone else. 17 U.S.C. § 101 (1988).

39. The fraction of the discounted present value of a constant level of earnings per year of returns earned after the seventy-fifth year remains at just over 22%, at a 2% real discount rate. This fraction diminishes at higher discount rates. For example, at a 5% real discount rate, over 97% for the earnings-in-perpetuity are received by the seventy-fifth year. However, it is also worth noting that almost 94% of the earnings are received by the fifty-sixth year, so the extension makes little difference in terms of the present value of a decision to publish. In light of the risk associated with the creation of much copyrighted work, the higher discount rates are more likely to be appropriate. If so, the current law, as a practical matter, renders the copyright effectively infinite, at least as far as it would affect the incentive to create works.


Thus, accidental findings get a property right, while the intellectual property claims following creative effort are, in contrast, attenuated. Similarly, one could well view copyright as an attenuated property right. It may be little more than the result of the technological happenstance that it is relatively easy to build fences around naive property, whereas copyrighted work or patents are more difficult to protect against infringement. Common law can develop for the former; only a statute can establish quasi-ownership for the latter.

B. The "Economic" Objection—Copyrighted Work as "Public Goods"

Another happenstance may help explain the economic objection to copyrighted information as property. A hallmark characteristic of information is that possession of it by one person does not imply that others cannot also possess it. In this regard, we can contrast information with an automobile. My ownership of an automobile implies that you too cannot possess it: you can possess a different model of the same automobile, but you cannot possess that particular one. This idea of "nonrivalrous" possession is the defining attribute of what economists call "public goods," as differentiated from "private goods" such as the automobile. "Public goods" need not be public goods in the conventional sense. Married: With Children is no less a public good on this account than Hamlet. Moreover, goods like education or health care, frequently regarded as public goods in common policy parlance, are private goods rather than public goods in the economist's lexicon. The seat one has in a classroom cannot be occupied by anyone else; the time one spends with a doctor cannot be possessed by anyone else.

The absence of perfect correlation between "public goods" and the

42. Economists usually use the term “consumption,” but it seems to make more sense to think about this issue in terms of possession. The same meal cannot be consumed repeatedly, but a book can be re-read, and a compact disc can be listened to over and over again. The very idea of nonrivalry itself is inconsistent with “consumed” in the sense of being used up. Moreover, much of the information many of us possess in our bookshelves, photo albums, and music cabinets is not consumed, in the sense of being ingested.


Some commentators include in the definition of a public good the idea that it is not feasible to exclude those who don't pay for using it. JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 120 (1988). As we will see, the ability to exclude is a necessary condition for having effective, reliable private markets for any good, whether or not possession is nonrivalrous. See infra text accompanying notes 69-70. However, some public goods can be made excludable. For example, to an economist the justification for copyright is to promote excludability of otherwise nonexcludable, nonrivalrously possessable goods—copyrightable works. Attaching the term "public good" to both nonrivalry of possession and nonexcludability of access implies that we cannot speak of "privately provided public goods," and it would require that we come up with another term to refer to public goods that are in fact excludable.
public good does not in and of itself take away from the simple economic intuition underlying the unease of copyright. Abstracting from the important question of whether a good desired is a good desirable, normative economic theory states that a good should be supplied up to the point where the added cost of making it available to one more person just begins to exceed the added benefit that good brings to the person who consumes it. For private goods, this leads to a straightforward policy precept—provide goods as long as the consumer is willing to pay enough to cover the marginal cost of production. For public goods, the precept still applies, but with some interesting wrinkles. To answer the question of how much of a public good to produce, e.g., how many books to write, the cost-benefit test suggests that more should be produced up to the point where the cost of producing an additional work—creator time, materials, space, and equipment—equals the added benefits of the work to all of the possessors. Since possession is nonrivalrous, each possessor's benefits should be incorporated into the calculation.

The pertinent intuition underlying the unease with copyright protection, however, comes from using the cost-benefit test to determine how many people should be allowed to possess a public good. If possession is nonrivalrous, the added cost of allowing an additional person to consume the public good is zero. Therefore, anyone who places a positive value on the use or consumption of a public good ought to be able to use or consume it.44

The implications of this conclusion for copyrighted work are obvious and well-known. While the physical embodiment of a copyrighted work—the paper on which the words are printed, the disc on which the music is stored—is a private good, the copyrighted work itself is a public good. According to the cost-benefit principle stated above, the best test of whether someone places a positive value on something is to ask whether he or she would choose to own it if it were free. Copyright, by allowing a copyright holder to exclude those unwilling to pay the chosen price, will exclude those who are willing to pay a positive price, i.e., who would choose it if it were free, but are not willing to pay the copyright holder's price. If there are such persons—and there need not be—copyright results in too little access to the copyrighted product.

44. There are middle cases between complete rivalry, e.g., a hamburger, and complete nonrivalry, e.g., a broadcast signal. Use of a bridge or park may be almost nonrivalrous, but such use may impose costs on others due to congestion or the distraction of having others around. In such cases, access to the public good may be conditioned on paying a fee equal to the costs of congestion. RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 166 (1986); James M. Buchanan, An Economic Theory of Clubs, 32 ECONOMICA 1 (1965).
This obviously does not imply that elimination of copyright would make the world a better place. Creators are far less likely to create copyrightable works if they cannot be compensated for their time and trouble. However, it does explain why copyright, and the concomitant treatment of copyrighted information as property, could be viewed as at best a necessary evil. 45

C. The “Social” Objection—Copyrighted Work in the Public Good

The economic objection was based upon the attributes that make information a “public good” in the economist’s technical sense. An additional set of objections is based upon the more familiar sense of public good, as goods and services that contribute to making the polity and society better. 46 Freely disseminated information has been viewed as just such a public good. This view can be traced to the founding fathers of the United States. They were concerned that the public interest in information should not be treated as property, motivated by the belief that unfettered access to information would “promote technological and economic progress” and be “an essential step in building the fledgling nation.” 47 A recent report by the Office of Technology Assessment highlights three arenas in which information dissemination contributes to the public good—the political, the cultural, and the individual. 48 Each of these three areas could be adversely affected by the ability of copyright holders to limit access to their works, whether motivated by profit or personal predilection.

45. A perhaps more interesting possibility is that creators of copyrightable work might still be compensated even in the absence of formal copyright protection. For suppliers of unauthorized copies to survive, the price must cover both the marginal cost of producing copies and the fixed costs involved in setting up a copying operation. Since those suppliers will be competing against the original creator who has already sunk its original creation costs, it is possible that the competitive price might be insufficiently above the marginal cost of making copies to cover the copier’s fixed costs of entry. If this is a rational expectation—which depends upon both the expected intensity of competition and the size of the fixed costs of entry—copiers would not enter, even without the potential force of copyright sanctions. Brennan, supra note 11, at 375-76.

46. An important philosophical issue, not to be taken up here, is the extent to which there is a “public interest” apart from the possession and consumption available to each of the individuals in the public. Advocates of allowing economic markets to determine broadcast content have argued that “the public’s interest, then, defines the public interest.” Mark S. Fowler & Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 210 (1982). We need assume, for purposes of this discussion, only that there can be norms of judging the performance of political and cultural institutions beyond whether they respond to private willingness to pay. In any case, for purposes of this article, it is necessary only to find that there is widespread resistance to allowing copyright to create property rights in information based upon these social concerns. Whether this resistance is in all cases reasonable is a debate for another venue.

47. Samuelson, supra note 14, at 371-72.

The primary political role of information is in ensuring that the electorate is sufficiently informed to make judgments regarding the current and prospective performance of their governmental institutions. Much of the support for the First Amendment protection of freedom of speech springs from its protection of political speech, and the ability to get information depends on the ability to send information. To the degree copyright converts politically relevant information into excludable property, it allows the owners of that information to condition access to that information on the receivers' willingness to pay or, perhaps more insidiously, on the receivers' prior political viewpoint. The "fair use" exception for news-related uses follows from the premise that such restriction would be detrimental to society.

A second aspect of access to information is its effect on a society's culture. Copyrighted works—literature, music, films, graphic arts—are, with political, ethnic, and religious institutions, the defining components of a culture. Treating these as property essentially means that these defining components, and our culture as whole, can be owned with the perquisites of buying, selling, and excluding. Not only do these cultural aspects define our society, they also are part of what comes to define our own personalities and aspirations. Copyright law reflects these concerns to only a small degree, through the limited "fair use" exemption for educational uses.

III. THE UNEASY CASE FOR PROPERTY

A. The Unease

At one level, the discomfort associated with treating copyrighted work as proprietary information rests on distinctions between the two. On the other hand, this unease may be an extension of the suspicion that nothing should be so treated. As with so much else, Shakespeare proba-

51. The potential effect of cultural symbols and artifacts on desires and aspirations is a distinct effect from the economist's "public good." For the economist, a public good is defined and evaluated according to the preferences of persons as given. Cultural artifacts are also important because they change those preferences. Where such preference change is predictable, standard economic efficiency norms do not apply. Timothy J. Brennan, Economic Efficiency and Broadcast Content Regulation, 35 Fed. Comm. L.J. 117, 131 (1983). Among other consequences, this argument has led some economists to rescue those norms by claiming that apparent preference change-based behavior really is an effect of changes in information available to agents whose underlying preferences remain constant. George J. Stigler & Gary S. Becker, De Gustibus Non Est Disputandum, 67 Am. Econ. Rev. 76 (1977).
bly best described the nature of the feelings many have as to how good the world would be but for the protection of property under the law. In the following excerpt from *Henry VI*, Jack Cade, Dick the Butcher, and other rebels against the king are discussing their goals. One of the lines in this excerpt is familiar (perhaps painfully) to many lawyers, but the less well-known context is of primary interest here.

CADE

Be brave, then; for your captain is brave, and vows reformation. There shall be in England seven halfpenny loaves sold for a penny: the three-hooped pot shall have ten hoops; and I will make it a felony to drink small beer: all the realm shall be in common; and in Cheapside shall my palfrey go to grass: and when I am king, as king I will be—

ALL

God save your majesty!

CADE

I thank you, good people: there shall be no money; all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers and worship me their lord.

BUTCHER

The first thing we do, let's kill all the lawyers.

CADE

Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo a man? Some say the bee stings: but I say 'tis the bees wax; for I did but seal once to a thing, and I was never mine own man since.

This excerpt sets out the utopian view of a property-less society. When "all the realm" is common, prices would fall, there would be no need of money, and plenty of food, drink, and apparel would be available for everyone—so much that drinking only "small beer" would be a felony. It is only the parchment, enforced by the lawyers, that undoes men.

The proponent of property has always had the burden of justifying an individual's right to threaten exclusion and demand payment. One obvious tactic is to attempt to subvert the issue by claiming that the vices of property would not be so bad if it were more evenly or justly distributed. This is a tack taken by both utilitarian and egalitarian proponents, as well as recent contractarian theory. However, these theories

54. Id.
55. If all persons have the same utility of owned wealth, and the marginal utility of wealth falls as wealth increases, the utilitarian prescription is equal wealth distribution. A way to achieve this result, recognizing that persons may have different tastes in terms of how they would elect to consume their wealth, would be to let them freely trade with one another once resources have been distributed. Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 286 (1981).
56. Subject to a guarantee of liberty for all, John Rawls would distribute primary goods so as to
do not address the institution itself; they only excuse it.

Two leading classes of theories have been offered to justify property—"intrinsic value" theories, particularly that of John Locke, which defend the value of property arrangements in and of themselves, and "instrumental value" theories, particularly those recently based on the work of Ronald Coase, that justify property as a means to an independently valued end.

B. The "Intrinsic Value" Justification

A theory of property is something that provides ethical justification for "A owns X." Classical theories of property treat "A owns X" as a primitive fact to justify on moral grounds. These theories attempt to explain why A should get all the rights of control, exclusion, and sale that come with owning X. In these classical theories, such as Locke's, the question of whether A should own X is treated as one of intrinsic merit or A's desert. The answer to the question is based on the idea that A is entitled to appropriate the fruits of his labor. A should own X if X would not be there without A's doing. A has a prima facie moral right to his person and, in a sense, X is an extension of the self. Allowing A to own X preserves intrinsically valuable considerations of integrity, autonomy, and survival.

A justification of copyright follows from this classical defense of property rights. As James Ely says, "It is difficult to overstate the impact of the Lockean concept of property" in the colonial development of constitutional law, which, as noted above, includes explicit mention of intellectual property protection. Assume that property ownership is justified by the argument that the property is an extension or embodiment of the welfare of the least well-off class of individuals. Rawls, supra note 21, at 152-54. This theory is based upon a theoretical "original position" contract among individuals behind a "veil of ignorance" who do not know whose life they would end up leading. Id. at 118, 136. Rawls argues, in effect, that since we only have one life to lead, we would be maximally averse to risk in the "original position," and thus would structure social institutions to limit how badly off we could end up, however unlikely that might be. Id. at 154.


58. Coase, supra note 19, at 1.

59. I apologize for the oversimplification here. I do not mean this to be in any way an authoritative treatment of Locke's property theory or the philosophical tradition in which it lies. For a thorough survey and appraisal of Locke's theory, see Waldron, supra note 57, at 137-252.

60. Id. at 173, 184.

61. Locke's natural rights justification for property rights against the state also had a theological foundation. Id. at 143-47.

62. James W. Ely, Jr., The Guardian of Every Other Right 17, 29 (1992), citing the influence of Locke on Jefferson in drafting the Declaration of Independence.
ment of the self. The corollary justification for copyright would be that
the intrinsic value of the self or one's autonomy would be violated with-
out the ownership of one's creations; the ability to create is one of the
fundamental activities that defines or constitutes the self.63

Many steps in this chain of reasoning may be subject to criticism,
but I want to focus on the initial premise that the classical property justi-
fication is sound and applicable. It is no accident that the stories used to
support the classical theory are pastoral and agrarian. The image is of an
unskilled farmer collecting apples from a tree or plowing a field. In such
a world, there is no meaningful joint production combining contributions
from many persons to make goods and service. There is no ambiguity in
deciding who is responsible for a particular piece of property being
created.

In contrast, try to determine on a classical account whose property
is this article. Is it mine? The publisher's? The printer's? Does it belong
to Microsoft or Apple, without whose efforts this paper would not be
here? How about all the colleagues cited above who gave me their ideas?
To be post-modernist, perhaps the article belongs to you because you
provide its context and, by reading and commenting, provide meaning.
One possible resolution might be to say that in a complex world, prop-
erty is inevitably joint. However, joint property cannot be defended eas-
ily as an extension of the self, without straining the intrinsic values of
integrity and autonomy that justify granting the right in the first place.

We are left to conclude that on the classical account, property rights
are either underdetermined—there exist objects without clear owners—
or overdetermined—there exist objects with too many claimants to own-
ership. This very ambiguity, I think, explains the popularity of classical
property theory among reformers. If the classical theory is the only po-
tentially reasonable theory of property, and if it explains so little of our
current property rights structure, then the distribution of property rights,
if not the institution of property itself including intellectual property, is
politically up for grabs.

Two potential limitations of property rights in Locke's account may
be relevant here. While he does believe in rights to property in which
one's labor is mixed, the rights are not unqualified. Waldron identifies
two important restrictions on that right. The first, called the "spoliation
proviso," is that a property right to an object is lost if one does not "use"

63. It is in exactly this sense that the standard, usually unanalyzed, presumptive case in First
Amendment analysis is not the "print" model, but rather the "throat" model. Owning a media asset
implies unlimited speech rights because the asset is an extension of one's throat.
the object. Specifically, Locke says that a right to property may extend to “[a]s much as any one can make use of any advantage of life before it spoils; so much may he by his labor fix a Property in. Whatever is beyond this, is more than his share, and belongs to others.” While “use” may be broadly construed as providing “utility” in the economist’s sense, including pure pride of ownership for its own sake, we might presume that Locke had something more substantive in mind. This, however, may call into question the right to harbor either naive property or copyrighted work, be it out of privacy or pique.

The second potential qualification Waldron identifies in Locke is that one’s right to property may be limited if full rights would keep others from reaping the fruits of their labor. Gordon has noted this qualification in applying Locke’s theory to intellectual property rights. This constraint could provide philosophical justification for public access policies such as “fair use.” If so, rights in particular commodities might merit some attenuation to ensure that the public has an ethically proper opportunity to use particularly important copyrighted work or information.

It is important to note that not all philosophers support this interpretation. While quoting Locke—“For he that leaves as much as another can make use of, does as good as take nothing at all,”—Waldron finds that Locke’s text does not support limiting property claims when there is not “as much as another can make use of.” However, unless we can extend Locke’s theory of property, as based on the embodiment of the individual’s labor, to a society based on collective production, this question is moot.

C. The “Instrumental Value” Counterargument

The problems with justifying property and its attendant privileges through the intrinsic value theories have led to other theories. A second contending theory of property, based on the view that property, as an institution, facilitates persons’ abilities to secure efficiency by providing the excludability and alienability necessary for consensual transactions,

64. Locke, supra note 18, at 308, 318; see Waldron, supra note 57, at 207.
65. Locke, supra note 18, at 309; see Waldron, supra note 57, at 209-10.
66. Gordon, supra note 10, at 102-03.
67. WALDRON, supra note 57, at 208-16.
68. Id. Waldron observes that perhaps a property owner has an obligation to be charitable if others are deprived, but the property rights themselves remain legitimate. Id. at 215. But see Wendy J. Gordon, A Property Right in Self Express: Equality and Individualism in the Natural Law of Intellectual Property, 102 YALE L. J. 1533 (1993).
was developed by Coase. In *The Problem of Social Cost*, Coase pointed out that market failures were the result of the inability to charge costs and reward benefits through market exchange. Once alienable property rights were defined, people could achieve jointly beneficial outcomes unless transaction costs make collective resolution prohibitive. If the distribution of property rights has no effect on how a person values the relevant outcomes, the outcomes will be identical regardless of how the rights are distributed. This latter observation has come to be known as the "Coase Theorem."

The theory of property suggested by Coase's work differs from the classical conception in two important and related ways. First, the relevant question not only asks why a particular person should own X, but also asks why *anyone* should own X. Coase justifies property not by the claims of the property holder but by the worth of property rights themselves. Second, and consequently, the justification for property is not grounded in the intrinsic value of its relationship to the owner. Property is necessary for instrumental reasons: it enables people to move ownership around until all mutually agreeable outcomes have been reached. Consequently, the Coase analysis is not subject to the moralistic turn in the classical conception of property. Moreover, the Coase argument does not lead to the ambiguities in ownership claims that the classical theory leads to when production is collective.

The economic justification for property leaves aside the question of how property rights should be distributed among the members of society, that is, who should get what. At least three considerations help fill that rather significant blank. The first recognizes that transaction costs may not be insignificant. If transaction costs are significant, the ability of people to reach mutually beneficial outcomes may be affected by granting property rights in one way or the other. Moreover, even if mutually beneficial outcomes could be achieved, transaction costs could be avoided if the outcome is anticipated by the initial allocation of rights rather than

69. Coase, supra note 19. Excerpts from some of the leading defenses of property theory along the lines set out by Coase are presented in *Economic Foundations*, supra note 22, at 1-50.

70. Stanley M. Besen et al., *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. ECON. 67 (1978), applies this principle in developing a criticism of the compulsory license for broadcast retransmission. They point out that if transaction costs were negligible, cable systems and broadcasters would set up elaborate rebate or surcharge schemes just in case the compulsory license fee differed from what the market price would be absent the license. For example, if the license fee were $2 and the market price for retransmission were $3, a station could in principle threaten to go out of business unless the cable system paid it the extra dollar. The very fact that transactions, including both the threat/counteroffer process and the administration of penalties or rebates, are costly is what makes controlling price at a level apart from the market price inefficient. For a summary of this argument, see Brennan, supra note 11, at 380-81.
by requiring persons to bargain and exchange. Therefore, legal or property rights can be defined to anticipate the outcomes that would have transpired had transaction costs been negligible. We can call this the efficiency justification for assignment of property rights.

A second consideration follows from the recognition that while outcomes may be independent of the allocation of property rights in an ideal world of costless transactions, the distribution of wealth will not be. Who gets to charge, and who has to pay, is very much determined by the structure of property rights. We may want to assign property rights to ensure that criteria of distributive justice are met or that wealth inequality is minimized. We can call this the equity justification.

Third, the ethical justification of the Coase property framework depends upon the ethical permissibility of exchange, often because doing so would violate a moral right. It may be that some objects should not be up for sale. For example, in our society it is widely recognized that slaves, babies, and political votes are inalienable. More controversial potential inalienabilities include blood donation, education, and surrogate motherhood.

The efficiency, equity, and moral rights considerations that affect property ownership could be used fruitfully to study assignment of copyright in relatively marginal situations. These situations include issues such as work-for-hire or the "moral rights" issue associated with whether, for example, films can be colorized without the director's consent even if the director is no longer the copyright holder. With regard to the assignment of copyright, the initial creator is the most likely agent to see that her creation is put to its most valued use. Perhaps it would be more cautious and accurate to say that there is no systematic way to realign rights away from the creator that would lead to better uses or reduce transaction costs. A prospective copyright holder of some pro-

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71. The connection between moral rights and the immorality of alienation is discussed in Timothy J. Brennan, The Fairness Doctrine as Public Policy, 33 J. BROAD. ELEC. MEDIA 419, 422-26 (1989), and is set out in Timothy J. Brennan, Rights as Inalienable (unpublished manuscript, on file with Chicago-Kent Law Review) [hereinafter Brennan, Rights as Inalienable]. The term "moral rights" here is used in the philosopher's sense, not the copyright specialist's. Whether there is a connection between the idea that the philosopher's moral rights entail inalienability and the copyright moral right that essentially prevents a creator from alienating the right to modify a work against her wishes is a question deserving some further work. Id. at 19-20.


74. See infra text accompanying notes 135-42 for a discussion of how fair use could be justified as an exception to this rule.
spective work other than the creator would have to devise a way to find the creator and pay her to get that prospect realized.

Insofar as property is valuable in providing the conditions for value-maximizing exchange, copyright likewise can be justified to the extent that it is defined to work as property does. We have seen, however, that copyright appears to be treated in ways systematically different from property under the law. Whether this compels us to regard copyright differently from naive property depends on whether property rights are modified like copyright in non-copyright settings.

IV. COPYRIGHT-LIKE TENSIONS IN NAIVE PROPERTY SETTINGS

As discussed in Part II, the tensions between copyright and property can be attributed to three core objections. The legal objection is based upon the statutory origins of copyright and the limitations on applicability, excludability, and duration in copyright. The economic objection is based on the "public good" nature of copyrighted work, which leads to the conclusion that copyright work will be made available at an inefficiently high price. The social objection is based on the idea that treating copyrighted work like property grants exclusive control to material crucial to the functioning of our political systems and the development of our culture and our selves. However, these three objections require us to conclude that it is inherently wrong to regard copyright as granting property rights in information only if naive property could not be modified, as is copyright, to take these considerations into account when they apply in non-copyright contexts. The opposite, however, appears to be the case.

A. The Legal Objection, Reconsidered

The first legal objection to conveying property status to copyrighted work is formal—copyright is a product of statute, whereas property is a product of common law. According to Ronald Dworkin's legal theory, a consequence of this distinction is that property law will tend to respect rights more, whereas statutory law will tend to promote interests.

Interestingly, economists have often taken a diametrically opposed view. The common law tends toward efficiency, on the economic account, because over time the most valuable outcome will be reflected in the relative expense and effort devoted toward common law litigation.

75. See supra text accompanying notes 22-51.
76. For a useful survey of the literature, see Paul H. Rubin, Common Law and Statute Law, 11 J. LEGAL STUD. 205, 206 (1982).
On the other hand, the legislative processes producing statutes tend to respond to the salient interests of particular supplicants without the rule-based constraints facing judges. If this distinction is valid, it suggests that the common law tends toward value maximization, leaving the issue of particular protection to the legislature, rather than the other way around. The fact that plausible arguments regarding the distinctions between common and statutory law move in opposite directions indicates that the meaning of any distinction in the origins of copyright and of property law is not clear or compelling.

Rubin adds three other arguments that raise questions about the pertinence of the distinction. First, he reviews a variety of statutes that have played a role in property law, including instituting fee simple land tenure, allowing women to sell land, and creating homestead rights in public lands. Second, citing Tullock, he points out that the economic forces supposedly causing the common law to be efficient—that gainers would tend to outspend losers—would be expected to influence legislation over time as well. Third, citing Epstein, he surveys developments in the common law that at least appear as inefficient as statutory interference in free exchange. These all suggest that copyright work and property ought not to be kept distinct simply because of their origins.

The second legal objection to treating copyrighted work as property is more substantive—that copyright law has characteristic attenuations on ownership that property law lacks. These attenuations impose limitations on copyrightability, alienability, and duration. However, property law is itself subject to similar restrictions. With respect to scope, the public can designate land, air, water, or other resources (e.g., citizens band radio spectrum) as property common to all. Alienability restrictions are embodied by, among other things, zoning laws which forbid some land owners from making land available for particular uses. Property law even has duration restrictions of sorts, embodied in statutes of limitations permitting adverse possession or the rule against perpetuities. These examples do not necessarily show that property law is efficient, or, in the case of the rule against perpetuities, comprehensible.

77. *Id.* at 207-11.
78. *Id.* at 207 n.4 (citing GORDON TULLOCK, TRIALS ON TRIAL (1980)).
79. *Id.* at 209 n.10 (citing Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J. L. Econ.* 293 (1975)).
81. *Id.* (3d ed. 1992) at 194-206. The rule against perpetuities invalidates interests in property that do not vest within twenty-one years, plus a period of gestation, after some life or lives in being at the time of creation of the interest. BLACK'S LAW DICTIONARY 1195 (5th ed. 1979).
They do show that property can be modified in copyright-like ways without requiring that the objects in question be regarded as something other than property.

B. The Economic Objection, Reconsidered—Public Utility Regulation

The second class of objections to interpreting copyright as granting a property right over information is based on the economics of public goods. Where effective, exclusionary rights govern public goods, a positive price to each user, and perhaps for each use, will exceed the zero marginal cost associated with additional users or uses. Information, apart from the tangible media used to carry it, is the quintessential public good. Thus, the quasi-property right granted by copyright over creations and expressions prevents the efficient distribution of access to copyrighted works.

As noted above, forcing copyright holders to make their work available at the efficient price would result in no payments for copyrighted work. Thus, the only work we would have would be that which creators would provide for free. The prevailing alternative, however, is to grant an unrestricted monopoly over the copyrighted work, the seemingly logical outcome of electing to treat copyrighted work as naive property. However, there are numerous contexts involving naive property in which the government prevents the selling price from reaching the monopoly level. The policy goals underlying this regulation are mitigating the inefficient incentive to withhold output in order to raise prices and profits, preventing an inequitable redistribution of wealth, and ensuring that individual rights of participation in, or access to, social networks are not infringed.82

One such context is public utility regulation, e.g., control of local telephone rates. Such industries are typically characterized by “natural monopoly” conditions, that is, one firm can supply the product to an area at less expense than two or more dividing the market among themselves.83 For example, the investment of a second firm in installing local electrical transmission lines, sewer systems, natural gas pipes, or telephone distribution networks would be largely redundant; one of those

82. It should be acknowledged that this is a somewhat Pollyannish view of public policy. Many students of regulatory processes find that they are at least as likely, if not more likely, to be a predictable means of ensuring that prices are kept high, inequitable incomes preserved, and individual rights infringed. RIGHTS AND REGULATION (Tibor Q. Machan & M. Bruce Johnson eds., 1983); George J. Stigler, The Theory of Economic Regulation, in THE CITIZEN AND THE STATE 114 (1975); Richard A. Posner, Taxation by Regulation, 2 BELL J. ECON. MGMT. SCI. 22 (1971).

networks can satisfy demand. Where the redundancy costs are great, the market will typically end up with only one monopoly provider. If consumers are willing to pay a great deal for the commodity, this monopoly will be able to charge high prices while enriching itself and impoverishing the consumers in the process. To prevent this outcome, the public may regulate the fees charged to bring them more into line with the actual costs of providing the service and to mitigate the inefficient stifling of demand associated with charging high prices.  

If regulation is to be administered effectively, the regulator must have some idea what the right price is, taking both consumer demand and production cost into account. In the traditional markets where public utility regulation has been implemented—water, natural gas distribution, electricity, local telephone service—the products are relatively simple and homogeneous, making production cost estimates possible. In addition, demand for these commodities is fairly insensitive to price, making quantity predictions, cost estimates, and tariff calculations feasible. Whether such regulation is at all feasible for copyrighted works, with widely varying characteristics, demands and production costs, is extremely doubtful at best.

The point, however, is not that regulation should be instituted for copyrighted works. Rather, it is that limiting the extent to which owners can charge inordinately high prices for their property is consistent with regarding copyrighted works as property. One could therefore impose such regulations on copyrighted work, in principle, without electing to deny property status to that work. The reason we do not do so is not

84. Whether such regulation should actually set prices directly on the basis of costs or allow prices to diverge from costs after some initial date is a continuing policy question. Timothy J. Brennan, *Regulating by Capping Prices*, 1 J. REG. ECON. 133 (1989).

85. A substitute for regulation is public provision, where the product is supplied at a price equal to marginal production cost and other costs are covered by tax revenues. The decision of a government to provide copyrightable work, e.g., data tables and policy reports, and the policy not to grant the government a copyright on the work, could be interpreted as the designation of a set copyrightable works that should be supplied to the public at prices below market-determined levels.

86. In the economic literature on patents, some theoretical results suggest that the policy that maximizes net economic benefit while ensuring a given level of expected profit to an inventor would be to have a patent of infinite duration, with a regulated license fee. In other words, the economy is better off by trading a longer license for a limitation in the monopoly premium a copyright holder could charge. Pankaj Tandon, *Optimal Patents with Compulsory Licensing*, 90 J. Pol. ECON. 470, 474 (1982). We regulate utilities the same way, holding down prices in exchange for a unlimited franchise, rather than allowing them to charge whatever the market might bear for a limited length of time.

This finding needs to be qualified, in that it is derived for process patents rather than copyright works whose economic value lies in satisfying consumer demand rather than reducing production costs. Nevertheless, Tandon's result indicates that in theory, if only in theory, regulation akin to public utility regulation would be the best method of guaranteeing returns to creators, further blurring the distinction between copyright and property.
because of the impropriety of assigning property status to copyrighted work, but because it is simply too difficult. If anything, the absence of such regulation supports applying the naive property conception to copyrighted work.

C. The Social Objection, Reconsidered—Universal Service, Civil Rights Laws

The final objection to treating copyright work as property is that much copyrighted material is important to the political and social life of a nation. The particular importance of informing the general public and educating its children justifies, to some degree, the application of “fair use” to news and educational uses. More generally, the importance of communication, design, and art in overall personal and cultural development appears to conflict with the vesting of access rights in the hands of the creators or their designated agents such as publishers or broadcast networks. Conceiving of copyrighted work as property would seem to raise a haunting specter of capitalist corporatism over our democracy and society, at least in the symbolic sense that counting the shopping days until Christmas seems to degrade the spirit of the occasion.

Whether such appearances reflect social realities or nostalgic sentiments is beyond resolution here. The sole issue is whether these appearances inherently justify withholding property status from copyrighted work. As with the legal and economic objections to regarding copyrighted information as property, looking to other areas of property law and regulation suggests that such withholding is not necessary to resolve social concerns regarding such a designation. Of the many examples that might be cited, two stand out. First, public utility regulation of the sort described in the previous section often contains “common carrier” and “universal service” requirements. Common carrier requirements demand that regulated utilities make their services available to all on equal terms and conditions. For example, a regulated bus, train, or telephone company has to serve to everyone willing to pay the (regulated) tariff. Besides ensuring a kind of fairness, such rules ensure that the owners and operators of these businesses are not able to condition access on the particular political or cultural opinions of the customers, e.g., that only supporters of policies that benefit the telephone industry can get telephones.

“Universal service” requirements reflect a policy goal that everyone should be a customer of an industry’s services. This goal has been applied most centrally to access to communications services, primarily

those provided by the local telephone networks. These policies may be defended on narrow economic grounds, citing "network externalities" that make a network more valuable the more people subscribe. However, they also reflect a decision, apart from the use value of a network, that full membership in the state and the society requires that one be part of the communication network and that special policies are needed to ensure participation by "the poor, the educationally disadvantaged, the geographically and technologically isolated, and the struggling small business." Defining universal service in terms of a set of communications services, measurement criteria, and funding options remains an open policy issue. Nevertheless, universal service policies reflect a kind of "fair use" or "compulsory license" for access to particular communications facilities that does not require us to reject the idea that such facilities can be regarded as property.

Even more compelling examples are laws seeking to fulfill specific social and cultural goals by limiting the discretionary use of property. Civil rights laws supply some leading instances. Under such laws, property owners are restricted in their ability to limit access to their property because they cannot deny retail service, rental tenancy, or employment on grounds of race or sex. Land developers may be required to set aside some housing for low income families. While civil rights restrictions reduce the level of freedom and profit a property owner may enjoy, they do not imply that stores, apartments, businesses, and land should not be regarded as property.

V. Suppression of Non-competing Uses

Thinking about copyright in terms of property naturally leads to one of the less desirable aspects of property—the right of the property owner to exclude others from the good. This undesirability is not unique to copyrighted work. The institution of private property allows persons to keep others from using their land, natural resources, or goods regardless

88. Critical Connections, supra note 48, at 253-54.
90. Critical Connections, supra note 48, at 243.
91. Id. at 253-54.
92. We might also regard public policies that guarantee free or subsidized access to cultural facilities such as libraries, museums, and schools a kind of "fair use" idea. In such cases, funding by and large is provided by public tax revenues, and the relevant property may be publicly owned or donated by private parties. However, the policies and actions that make these facilities available do not force us to conclude that books, paintings, and classrooms should not be considered as property.
of the wealth of the former and the property with the latter. Still, copyrighted works raise special questions for at least four reasons:

(1) **Public goods:** Since anyone can use copyrighted works without exhausting any resources, restricting access has a *prima facie* air of petulance.

(2) **The First Amendment:** Restricting the dissemination of copyrighted work conflicts with the values of open debate among an informed public.95

(3) **Unintended Uses:** Where the creator of a copyrighted work is able to keep others from using the work in ways he had no intention of pursuing, the presumably desirable use of the work is absolutely reduced. There is no compensating economic reward to the creator from this reduction, suggesting that there is no added incentive to create that would compensate for this reduction in desirable uses.96 This is particularly true of an author’s right to suppress unpublished work for which publication was unintended,97 even if the author would have been credited.98

(4) **Common practices:** A number of practices involving copyrighted works, such as parody99 and criticism,100 are thought desirable but would seem ripe for suppression if full property rights were extended to copyrighted works.

Having discussed political and economic constraints on ordinary property, the next step in assessing the property status of copyrighted material requires discussion of the problems presented by suppression that threaten unintended uses and common practices.

A. **Allowing the Suppression of Unintended Uses—An Economic Approach**

If allowing copyright holders to treat their work as property is disagreeable, by definition, the less of that the better. The "uneasy case" for

95. Wendy Gordon has referred to the ability of a copyright holder to deny access as "private censorship." Gordon, *Jurisprudence of Benefits*, supra note 17, at 1011.

96. "The theory behind the copyright laws is that creation will be discouraged if demand can be undercut by copiers. Where the copy does not compete in anyway with the original, this concern is absent." Consumers Union of the United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1051 (2d Cir. 1983) (court vacated a preliminary injunction prohibiting advertising of vacuum cleaner rating in *Consumer Reports*), cert. denied, 469 U.S. 823 (1984); Life Music, Inc. v. Wonderland Music Co., 241 F. Supp. 653 (1965) (denying preliminary injunction to halt alleged infringement by the song "Supercalafajalistickeespeelaadojus" of the song "Supercalifragilisticexpialidocious").


98. Landes calls this a "reproductive use." *Id.* at 104.


100. *Id.* at 69-70; Gordon, *Jurisprudence of Benefits*, supra note 17, at 1042-43.
copyright is that such control is permissible only to the extent that it provides an incentive to spend one's time, energy, and money to produce copyable work of value. This *ex ante* perspective implies that the effect of the bargain on the potential creator extends only as far as reasonably foreseeable gains. Consequently, it might be argued, we ought not extend copyright beyond the uses from which the creator intended to earn rewards, as perceived at the time the creator made her commitments to devote effort and resources to creating. This has two potential implications:

1. Granting copyright control over unforeseen uses that develop later provides nothing more than windfall profits to the creator while at the same time raising the price to those who might have made use of the work in unforeseen ways; and

2. Granting control over unintended uses produces a power akin to private censorship.

To the extent that copyright is regarded as property, these two possibilities would argue against treating copyrighted work as property. The soundness of such an argument depends upon whether these two possibilities lead to deleterious consequences, and whether there is a workable way to limit the scope of copyright to mitigate these consequences.

1. Are Scope Restrictions Workable?

Let us turn first to the workability question. We can identify *ex ante* and *ex post* methods for limiting the scope of copyright, where the timing is relative to the acquisition of the copyright grant. The *ex ante* method would require that an application for a copyright should specify the creator's intentions regarding use. For example, a writer of a novel could specify that she wants to retain copyright over the story to apply to written reproduction, theatrical and film reproduction, audio taping, and television serialization. If, at a later date, an unforeseen use were to appear—the “virtual reality” home game, for example—that user would be able to adapt the work to that use without compensation. The *ex post* method would require that the issue of whether the creator intended the use or not could be resolved by litigation over infringement (or settlement in its expectation).

The apparent difference between the two methods is that the *ex ante* procedure substitutes specification up-front for litigation after the fact. In practice, however, the two methods would likely converge. Under the *ex ante* method, one might still expect litigation to resolve whether the description of intended uses accurately portrayed either the creator's in-
intentions or the use in question. Under the ex post method, one might expect legally compelling procedures to evolve whereby creators could establish evidence of intent in order to deter some potential future litigation. Be it by ex ante, ex post, or some procedure in between, any effort to condition copyright on foreseen, intended uses is likely to be very costly to implement. In the short run, the copyright bar would have the most to gain. In the long run, talent will be used for copyright contract writing or litigation that might have been more productively used elsewhere in society.

The legal policy question is whether these associated costs are worth the benefits. One might argue that the expectation of lost revenue from unforeseen uses might discourage production of copyrighted works. While it appears contradictory to speak of expected revenues from unforeseen uses, there may be a rational positive expectation of such revenues even if no specific use is foreseen. This leads to the problem of defining “uses” and “unforeseen” with specificity. With limited exceptions, someone who produces music for a recording cannot know who would purchase the recording. If we were to define “use” as “listening to the recording by Mr. X,” such use might conceivably be regarded as “unforeseen.” The obvious response is that unless Mr. X’s use may be unforeseen with certainty, there is some positive probability that he will purchase the recording. However, then it must be determined how improbable a use would be before it qualifies as unforeseen. One chance in a hundred? A thousand? A million?

More fundamentally, even if the uses are unforeseen and unintended at the time a creator is considering whether to commit effort and resources to produce a copyrightable work, the added costs of specifying uses and potential litigation will be quite foreseeable. Apart from any argument that there may be expected revenues from unforeseen uses, conditioning copyright enforcement on uses will raise the cost of creating copyrighted work. Contrary to the spirit of the proposal, this predictably would reduce the supply below current levels. 101

101. This may or may not be a bad thing, in that there may be too many copyrighted works produced under current law. The reason, essentially, is that the gains to a producer of a particular copyrighted work come in part from a transfer of profits from existing copyright holders toward his work. These are not net gains to society at large. Consequently, the actual net gains in terms of profits to the copyright holder net of these transfers and benefits to users may be less than the opportunity cost of the effort and the resources used to produce the copyrighted work. For a general argument of the possibilities in terms of the theory of imperfect competition, see Timothy J. Brennan, Entry and Welfare Loss in Regulated Industries, in COMPETITION AND THE REGULATION OF UTILITIES 141, 147 (Michael Crew ed., 1992); N. Gregory Mankiw & Michael Whinston, Free Entry
2. Foreseen but Unintended Uses

A further difficulty with this possibility is that some uses may be foreseen but not intended by the copyright holder. Two categories of such uses come to mind. The first, perhaps more benign category, involves uses that others can undertake more efficiently than the copyright holder.\textsuperscript{102} While interest in a film version of this Article is unlikely, if there were, surely neither I nor the \textit{Chicago-Kent Law Review} have any intention of producing the film. However, ensuring that the film would be made by the producer with the most appropriate skills and facilities requires that the copyright holder be able to grant an exclusive license through auction or negotiation. Unambiguity of control would reduce the transaction costs associated with getting the film rights in the hands of the most able producer. Perhaps more importantly, the incentive for any one producer to develop the film would be hampered if others could "free ride" on his marketing efforts.\textsuperscript{103}

The second category of foreseen but unintended uses involves those in which the copyright holder specifically intends that some uses of the work are not made. In some cases, the copyright holder’s interests are not protected;\textsuperscript{104} in others, the opposite holds. In \textit{Pacific and Southern Co.}, the courts found that "[t]he fact that [the copyright holder] does not


A full economic evaluation of copyright policy is impossible because the complexity of the competitive interaction and demand substitutions among copyrighted works is beyond the capability of economic theory or data to generate cost-benefit analyses. As a practical matter, economic analysis of specific copyright-related policies needs to be based on a "stand-alone" analysis that presumes either that the rest of copyright policy is approximately efficient or, at least, that general failures in copyright should not be addressed indirectly by policies with other primary intentions. In particular, conditioning infringement on the nature of use should not be supported because there may be too many works. If we believe there are too many copyrighted works, the copyright law as an entirety should be adjusted. Responding to this belief by limiting the scope of copyright for only those works where foreseeability of particular issues is an issue is likely to be a partial solution, at best.

102. The economic term for this would be "diseconomies of scope," meaning that two products (e.g., an article and a film) can be produced at lower costs by separate article writers and movie producers than by a single person or firm attempting to do both.

103. The recent spate of "Amy Fisher" made-for-television movies notwithstanding, arguments of this sort characterize the literature on "vertical restraints" between manufacturers and distributors. \textit{See} \textit{JEAN TIROLE, \TEXTIT{THEORY OF INDUSTRIAL ORGANIZATION} 177 (1988).}

104. \textit{See} \textit{Dow Jones \& Co. v. Board of Trade of Chicago}, 546 F. Supp. 113, 121-22 (S.D.N.Y. 1982) (no intention to start futures markets based on its stock indices); Consumers Union of the United States v. General Signal Corp., 724 F.2d 1044, 1051 (2d Cir. 1983) \textit{cert. denied}, 469 U.S. 823 (1984) (no intention to make product ratings available to advertisers). In both cases, the federal courts found that there was no harm to the market value of the relevant copyrights. With regard to Dow Jones’ futures markets, the Illinois Supreme Court found misappropriation but no harm to Dow Jones. \textit{Board of Trade of Chicago v. Dow Jones \& Co.}, 456 N.E.2d 84 (1983). Even in its decision generally supporting Dow Jones, the Illinois Supreme Court acknowledged that it was "circular" to base a copyright claim on a finding of misappropriation, since characterizing a use as "misappropriation" depends upon the legitimacy of the copyright claim in the first place. \textit{Id. at 89}.\textit{\ldots}
actively market copies of the news programs does not matter . . . .”105 In Salinger, the courts were at least as reluctant to attempt to condition copyright on intention. In assessing the merits of J. D. Salinger’s copyright claim over his unpublished letters, Judge Newman wrote:

[T]he need to assess the effect on the market for Salinger’s letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime. First, the proper inquiry concerns the “potential market” for the copyrighted work . . . . Second, Salinger has the right to change his mind. He is entitled to protect his opportunity to sell his letters, an opportunity estimated by his literary agent to have a current value in excess of $500,000.106

To argue that Salinger should not be allowed to copyright his letter to protect only his privacy interests grants primacy to economic claims over personhood or autonomy claims. Granting such primacy to economic interests runs counter to the idea that copyrighted work ought not be regarded as property in the first place.107 Moreover, the threat that copyright would not protect creations from being used in foreseen but unintended ways could discourage creative effort.108

106. Salinger v. Random House, 811 F.2d 90, 99 (emphasis in original) (citations omitted), cert. denied, 484 U.S. 890 (1987). In Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978), the court rejected defendant’s claim that use of plaintiff’s parents’ letters in an account of the parents’ trial was “fair use.” In support of its holding, the court relied on Folsem v. March:

What descendant or representative of the deceased author would undertake to publish at his own risk or expense, any such papers; and what editor would be willing to employ his own learning and judgment, and researches, in illustrating such work, if the moment they were successful, and possessed the substantial patronage of the public, a rival bookmaker might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits.

107. A similar claim underlies an argument by Yen that the fair use treatment of parody appropriately shows that the economic theory of property does not explain copyright law in its detail. Alfred C. Yen, When Authors Won’t Sell: Parody, Fair Use, and Efficiency in Copyright Law, 62 U. COLO. L. REV. 79, 82 (1991). Yen’s specific argument is that a parody inflicts on the original creator a loss of emotional tranquility tantamount to the loss of limb. Id. at 103. Consequently, authors would never agree to sell parody rights. Hence the fact that parody is permitted shows that efficiency does not and should not determine copyright law. Parody “fair use” determinations essentially ignore nonpecuniary harm to the author. Id. at 102.

This argument presents a number of difficulties. (1) If it were the case that parody inflicted harm on original creators equivalent to the loss of a limb, then allowing its fair use would hardly be proper. It would be unconscionable. According to Yen, the very virtue of this policy is that it allows parodists to inflict inescapable losses on originators. (2) Harm from parody tantamount to the loss of a limb would violate the personhood and autonomy that underlies the Lockean account of copyright that Yen favors. (3) If authors regarded parody so negatively, they would be dissuaded from creating works that lend themselves to predictable parody. That such works are created indicates that parody is not regarded with extreme trepidation, contradicting the empirical assumption on which Yen bases his attack.

We might add that on the Lockean account, a parody is an extension of both the originator and the parodists, raising the difficulties mentioned in the text accompanying notes 63-64.

Establishing a distinction between economic and non-economic claims may be difficult in any event. In the first instance, a copyright holder faced with loss of copyright could claim an intention to make economic gains. Salinger could say he planned to use the letters in his memoirs; Dow Jones could say that it planned to license use of its stock indexes in futures markets. Even where intention is lacking there may be economic harm: for example, *Consumer Reports'* publisher could argue that allowing sellers of consumer goods to profit from advertising its product rating might enhance suspicions that its reviews were prejudiced by under-the-table payments. Similarly, Dow Jones, Inc. may have a valid claim that the way in which it calculates its index might be susceptible to corruption if millions of dollars were being wagered on its future level. Richard Posner raises the example of the tee-shirts featuring the words "I Like Cocaine" written in an imitation of the copyrighted "I Like Coke" logo; Coca-Cola, Inc. might be able to claim economic harm from negative publicity.

There are a number of property-related policy options for dealing with these losses, pecuniary or otherwise. The "property law" solution would be to extend copyright to situations where these losses can be shown. The "liability law" solution would be to treat such losses as potential torts, without particular reference to copyright. The simplest solution, however, might simply be to presume in the first place that such uses are covered under the copyright. As such, the burden of enumerating uses perhaps should be borne by the side that specifies what would not be covered, rather than what is—as we have under the "fair use" doctrine. The theoretical advantage of granting the presumption of use rights, whether foreseen, intended, or neither, is that any potential user could negotiate with the copyright for the right to use. If the "Coase theorem" holds, the license will be granted if the gains to the user exceed the costs to the copyright holder, whether these gains are monetary or otherwise.

109. The court found that this harm, while possible, was not a harm to present copyrights, and hence would not exclude a "fair use" defense of the use of *Consumer Reports* ratings in advertisements. Consumers Union of the United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1051 (2d Cir. 1983), cert. denied, 469 U.S. 823 (1984).


111. One might think of these as the front and back of the "cathedral," as in the title of Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972). Copyright law recognizes this approach, to some extent. "When, as here, [the works in issue were not in active competition with each other] the court may require some showing of possible irreparable injury, although it is probably an abuse of discretion to require detailed proof of the danger or irreparable harm." Life Music, Inc. v. Wonderland Music Co., 241 F. Supp. 653, 657 (1965) (citation omitted).

112. Landes argues that the presumption that efficiency requires the copyright holder to have the
The copyright holder’s control over criticism as a use is particularly problematic. Gordon finds that the Coasian bargain for critical uses is tilted inappropriately in favor of the copyright holder. She argues that the fees critics would pay understate the value of criticism to both readers and creators of other competing works. This understatement arises partly because criticism is itself a public good that cannot easily be priced in such a way to capture its different values to different readers. However, problems of this sort can affect the copyright holder’s side of this bargain as well. For just the same reasons, the losses to the copyright holder as a result of criticism may understate the losses to the users—particularly if the criticism is unjustified—and the losses to sellers of complementary products who lose business as a result of the criticism. Moreover, the demand from noncritical licensees of the copyrighted work can also undervalue its value to its customers, e.g., the film and video rights to a book. If this is insufficient reason for granting fair use rights to such uses, we perhaps should hesitate to grant fair use rights to critical uses on similar grounds.

Finally, there remains one additional problem with banning the application of copyright to unintended uses. It may well be that before a particular time some set of uses for a copyrighted work might be unenvisioned, e.g., video tape companions to cookbooks. Cookbooks written prior to this time could be freely used under the “intentional uses” requirement for copyright. After such uses became apparent, probably from the time someone put out a video version of a pre-existing cook-

right may be mistaken, at least in the case of the use of “productive uses” of unpublished works. A “productive use” is defined as one that “incorporates the work it copies into a new work;” this is distinguished from “reproductive uses” that merely reproduce the works. Landes, supra note 97, at 87. Landes claims that there will be few potential “productive users” e.g., biographers of Salinger, thus making the transaction costs (as opposed to the payoff costs) low for Salinger to pay these biographers not to use his letters. Id. at 106-07. This may or may not be true for a biography, but it hardly seems true for all potential “productive uses,” e.g., performances of songs. The example of song performances suggests that the line between productive and unproductive uses seems rather vague, giving another reason to grant the variety of use rights to the copyright holder. Finally, while the costs may be relatively low for a copyright holder to negotiate with this handful of potential productive users, no argument is given suggesting that they would be lower than the costs associated with granting all rights initially to the copyright holder.

114. Id. For a more extensive treatment, including references to the public goods problem and the possibility that managers of firms that might pay for criticism might not act in a value-maximizing manner, see Gordon, Right Not to Use, supra note 17, at 60-70.
115. Losses to sellers of complementary products as the result of criticism are the flip side of the coin that sellers of substitute products gain as a result of criticism. Gordon, Jurisprudence of Benefits, supra note 17, at 1043, also discusses “income effects,” in that the critic’s gains might exceed the copyright holder’s losses only if the former has a use right. That may be, but this is not an efficiency issue. It may be that as a matter of distributive justice we might want systematically to make critics wealthier and creators poorer, although no justification is apparent.
book, subsequent cookbook writers would specify the video tape intention as part of their copyright. If so, this would create a bias in the market, favoring old cookbooks on video tape over new ones. Under some circumstances, this may lead to an aggregate inefficiency. The gains from having the old books available at marginal cost on video tape can be outweighed by the reduction in demand for the new books on video that sell at a premium above marginal cost.  

B. Criticism and the Rawlsian Contract—A Philosophical Response

The implication from economic theory supporting broad use control over copyright holders would seem to call the property analogy into question, since this would seem to allow creators to control critical uses of works. One apparent place to turn might be the classical theory of property that we found somewhat problematic. However, regarding copyrighted work in the Lockean terms of being owned by virtue of being an extension of the self only lends further support to the presumption that broad control should be vested in the creator.

Philosophical constructions from the contractualist perspective may be of use. Imagine a hypothetical contract among authors and critics in a pre-social situation prior to the institution of literature in which the bargaining individuals do not know which author or critic they will be, or even whether they would be an author or a critic. Then, suppose these parties are charged with the task of designing the rules for critical access to copyrighted work. If the authors and critics are not unduly averse to risk, this thought experiment should lead each to choose the most valuable overall system.

What might they choose? It is plausible that authors as a whole

116. This is an example of the "theory of the second best," in which the optimal response to a price in excess of marginal cost (the new books) is to have prices above marginal cost to some extent for substitutes as well (the old books). For a useful description of the theory, see F.M. Scherer, Industrial Market Structure and Economic Performance 548-50 (1970).

117. If criticism were to be regarded as a derivative work, copyright control might even extend to criticism that does not quote the work verbatim.

118. See examples cited supra note 21; see also T.M. Scanlon, Contractualism and Utilitarianism, in Utilitarianism and Beyond 103, 110 (Amartya Sen & Bernard Williams eds., 1982).

120. Rawls calls this pre-social situation the "original position," with the lack of knowledge as being behind the "veil of ignorance." Rawls, supra note 21, at 138-39. Landes appeals to the "veil of ignorance" in explaining why authors as a group would prefer a regime in which "productive uses" of limited amounts of unpublished material would be treated as "fair use." Landes, supra note 97, at 87.
would find their enterprise most valuable if critics as a whole were allowed to excerpt their works for purposes of explaining it to readers and informing them of their value. The overall value of the literary enterprise to readers, hence to writers, would be more valuable with open criticism, even if in some cases some authors would be worse off if criticism were allowed.121 The confidence of readers in the independent validity of criticism would be reduced if it were generally known that authors could decide who got to quote their work critically, because readers would presume that only favorable criticism would be so favored.122

VI. EFFICIENCY INTERPRETATIONS OF THE COPYRIGHT RESTRICTIONS

The discussion so far has shown that general considerations that warrant limiting the scope of copyright may warrant similar limitations of more conventional property rights. This would support the conclusion that copyrighted work could be regarded as property, subject to the public interest restrictions on exclusion and alienability that are imposed on naive property. The last piece of the puzzle requires that the particular restrictions embodied in the copyright law can be supported in a manner consistent with the theory that supports property, with the focus on copyrightability and fair use.123

A. Copyrightability

One of the leading tenets of the instrumental, economic justification for property is that, in Posner's terms, property should be "universal." As he puts it, "[i]deally, all resources should be owned, or ownable, by someone, except resources so plentiful that everybody can consume as much of them as he wants without reducing consumption by anyone else . . . ."124 Rubin adds the qualification that property rights ought not be

121. In Rawls' theory, each person is choosing not just a literary system but the entire society and their entire life's wealth and path. Rawls implicitly argues that in such a hypothetical situation when one's entire fate is at stake, each person would be maximally averse to risk, and thus would choose institutions that maximize the welfare of the least well-off person. RAWLS, supra note 21, at 302-03.


123. Timing might be added to the list, but under current law there is virtually no effective attenuation of the property right, under reasonable discount rates reflecting the economic risk associated with the development of copyrighted work. See Breyer, supra note 40; see also Landes & Posner, supra note 122, at 363.

124. Richard A. Posner, Economic Analysis of Law, in ECONOMIC FOUNDATIONS, supra note 22, at 13. An interesting contrast involves proposed restrictions of the ability of creators to cede irrevo-
defined past "the point where enforcement of title is more expensive than the value of ownership." This sends contradictory signals with regard to copyrightability. The initial part suggests that copyright ought to be imposed so the advantages of market exchange can be extended to expressions. On the other hand, the (economist's) public good characteristics of copyrighted work suggest that one can consume as much as one wants without taking from anyone else. This argues against conveying property status through copyright.

In a later work, Posner and Landes accept the conclusion that copyright could be granted where the advantages of market exchange exceed, essentially, the sum of the costs of charging a positive price for a public good and the cost of enforcing the copyright. This perspective provides a method of evaluating copyrightability issues within the economic justification for property. The copyright distinction between facts or ideas and expressions is important here.

At first glance, the property perspective implies that the "idea/expression" distinction may not be the right place to draw the "copyrightability" line. As the Second Circuit decision in Harper & Row illustrated, the distinction between fact and expression may become exceedingly speculative and metaphysical. In that case, the issue was whether excerpts from Gerald Ford's memoirs involving his pardon of Richard Nixon could be reproduced by The Nation. In deciding against the publisher of President Ford's memoirs, the Harper & Row majority claimed that Ford's statements were factual representations of his state of mind. The dissenting judge argued that these facts did not exist apart from Ford's expression and were copyrightable.

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cable reactive control, e.g., "moral rights" in copyright. See Brennan, Rights as Inalienable, supra note 71, at 19-20; Kohs, supra note 73.

125. Rubin, supra note 76, at 208.
126. Landes & Posner, supra note 122, at 326.
128. Landes and Posner argue for the distinction for four reasons: (1) economic welfare is greater the more suppliers of ideas there are; (2) future authors use ideas developed earlier; (3) copyrighting facts/ideas would lead to rent seeking; and (4) administrative costs are difficult in defining "rights in ideas." See Landes & Posner, supra note 122, at 348-49. However, the first three reasons apply equally well to expressions. If facts or ideas are as valuable, if not more valuable than expression, there is as much reason to assign copyright to provide an incentive to discover facts and develop ideas as there is to promote expressions. As discussed infra, the justification for the differing treatment of facts and ideas from expressions in copyright hinges on the fourth of Landes & Posner's reasons. See infra text accompanying notes 132-34.
130. Id. at 205.
131. Id.
The subsequent Supreme Court decision suggested a different rationale for the distinction. Justice O'Connor, writing the opinion that reversed this decision, argued that the test for copyrightability should be the presence of "originality," which Ford's book passed.\(^\text{132}\) To generalize, the relevant test should be whether the work at issue is attributable to a creator.\(^\text{133}\) On this account, the distinction between the copyright treatment of facts and expressions is that the former generally may be difficult to attribute while the latter may be relatively easy to assign. Understanding the difference as one of ease of attribution or, in Justice O'Connor's terms, the presence of originality, weakens the qualitative distinction that might argue against treating copyrighted information like property.\(^\text{134}\)

**B. Fair Use**

Fair use is nothing more than a zero-price compulsory license of copyrighted works for particular uses. From the perspective of the economic theory of property, such a license seems to preempt the market forces and negotiations that should tell us whether it is efficient to make the work available at a zero price.\(^\text{135}\) However, markets and negotiations can be costly, explaining why private parties allocate some transactions outside markets.\(^\text{136}\) More important in this context, these considerations can rationalize the allocation of property rights and the existence of "default" procedures in the law such as commercial codes, corporate organization, and bankruptcy. Such considerations can rationalize fair use as well, to the extent that it defines uses for which transaction costs are high and the expected negotiated price would be close to zero.\(^\text{137}\) An analogy


\(^{133}\) Brennan, supra note 11, at 377. For a statement of the necessity that copyrightable works must possess "more than a minimal or trivial amount of originality," see Moore Publishing, Inc. v. Big Sky Marketing, Inc., 756 F. Supp. 1371, 1380 (D. Idaho 1991).

\(^{134}\) The concept of "treasure trove" in property law refers to that "which was hidden so long ago that it would appear that no one with superior title to the property intends to reclaim it or can be found." REAL PROPERTY, supra note 15, at 49. While this is tied to the idea of loss, it is a concept of property law consistent with a deference to allowing anyone to use facts or ideas, to the extent that these are generically the types of information for which "no one with superior title... can be found."

In what might be interpreted as another use of the "treasure trove" idea, Landes and Posner discuss what they call a "tracing problem" in arguing for a limitation on the term of copyright. Landes & Posner, supra note 122, at 361-62.

\(^{135}\) Besen et al., supra note 70.

\(^{136}\) R. H. Coase, The Nature of the Firm, 4 ECONOMICA 386 (1937) is the lead article, but research into institutional organization springing from that work did not begin until the mid-1970s. For a recent survey, see Bengt R. Holstrom & Jean Tirole, The Theory of the Firm, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 61 (Richard Schmalensee & Robert D. Willig eds., 1989).

\(^{137}\) Brennan, supra note 11, at 382. See also Landes & Posner, supra note 122, at 357-58; Posner, supra note 97, at 69.
to fair use in property law might be an easement created by zoning or other property regulation.  

From an economic perspective, the primary test for whether a use would be "fair use" would be whether such use reduced the optimal profit opportunities to the copyright holder. Tests based on the nature of the work and the substantiality of the used material would be subsumed under this. The purpose-based justifications, e.g., news, education, and criticism, can provide independent justification by appealing to externalities (e.g., third-party benefits) or non-efficiency considerations, perhaps as established by a hypothetical contract. As with copyrightability, however, appeals to such justifications need not imply that copyrighted work is not property. Society employs a variety of tax and subsidy programs to support news (second-class mail subsidies) and education (publicly supported, freely available schools) without threat to the breadth of property. Even criticism is supported to some extent through public grants to academics. More to the point, contractualist arguments cited above to allow critical uses of copyrighted works may be employed to justify any number of social and redistributive policies which do not necessarily conflict with the idea of private ownership.

VII. CONCLUSION

Copyright appears to conflict with naive property theory in its constitutional and statutory origins, its limitations of scope, fair use, and public good characteristics, and its effect on political processes and cultural development. These distinctions, however, may be regarded as an outgrowth of unease with property generally. While property may be defended as a means to protect personhood, a more contemporary de-

138. An interesting issue is if and when fair use could constitute a "taking" as defined by property law. REAL PROPERTY, supra note 15, at 44. If insignificant loss of profits is taken to be a necessary condition for a fair use, no compensation may be necessary (unless the "fair use" causes other injury). On the other hand, where there are losses, the fair use may be socially beneficial but it need not be just or efficient for the copyright holder to bear the costs. This policy has been suggested in First Amendment contexts, in which Mr. A injured by Mr. B's speech could deserve compensation from the state, while preserving Mr. B's right to speak. Frederick Schauer, Uncoupling Free Speech, 92 COLUM. L. REV. 1321 (1992).

139. "The [fair use] doctrine offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry." Meeropol v. Nizer, 560 F. 2d 1061, 1068 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978). Perhaps not surprisingly, advocates for The Nation view the primacy given to economic criteria in determining "fair use" as regrettable. Leon Friedman, Purloined Letter, 255 THE NATION 797 (1992) (commenting on a judgment that Harper's Magazine infringed a professor's copyright by reproducing half of a letter he sent to students to recruit them to his course). See supra notes 117-22 and accompanying text.

140. See supra notes 117-22 and accompanying text.

141. Scanlon, supra note 119, at 112.

142. See, e.g., Dworkin, supra note 55, at 285.
fense may be to rationalize it as a means to the end of permitting mutually agreeable, efficient exchange. Yet naive property, even with this general defense, can be subject to restrictions similar in character to those found in copyright, reflecting similar legal, economic, and social values.

The broad right to suppress found in copyright raises particular concerns regarding censorship, the right to criticize, and the need to grant creators economic claims on unforeseen uses. The economic outlook tends to support such a broad right, but a contractualist perspective may support exemptions for certain uses, particularly the right to criticize. The final test of the property outlook is that its justifying theories are consistent with standards for copyrightability and fair use. In conclusion, as long as the word "property" is not inappropriately used to imply that use and exclusion restrictions are never permissible, there is no compelling reason to force copyright and property into separate philosophical, economic, and legal realms.