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Copyright and Dissent

Tomer S. Stein*

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This Essay brings to the fore the hitherto unnoticed feature of copyright: Copyright incentivizes dissent and protects marginalized authors. Absent copyright protection that allows authors to recoup their risks and costs, producers of unpopular works that deviate from the mainstream would have no incentives to pursue their socially valuable endeavors, unlike authors who reap reputational gains from catering to popular opinion. This insight has the potential for changing the terms, as well as the conclusions, of the ongoing debate over the desirability of copyright protections. Specifically, I demonstrate that the dissent-protecting rationale both coherently explains and aligns with all justificatory accounts of copyright law. Furthermore, I uncover an important, yet underappreciated, alignment between copyright and the First Amendment protection of speech: both copyright and the First Amendment are engines of speech that would have otherwise been silenced.

I. Introduction

Copyright functions as a mechanism for the encouragement and protection of dissenting, divergent, marginal, or otherwise unpopular expressions (henceforth “dissenting expressions”).¹ This previously unidentified function provides novel reasons to prefer a copyright I.P. regime over its common legal alternatives or lack thereof. These reasons are inclusive of and consistent with all justificatory theories of copyright as intellectual property. The dissent encouragement mechanism of copyright is not only normatively desirable, it is also doctrinally rooted and revelatory. Capitalizing on this previously unidentified feature of our copyright regime reveals and justifies the contentious doctrinal relationship between copyright and free speech rights. Specifically, this novel feature explains and justifies the current doctrinal relationship between the Copyright Clause and the First Amendment as complimentary constitutional norms.

Careful analysis of copyright as intellectual property unveils its function as a mechanism for the encouragement and protection of dissenting expressions. A deeper dive into copyright’s grant of an incentive to create expressions generally reveals that this incentive is substantially stronger for the incentive to create dissenting expressions. Since, absent copyright protection, dissenting authors would have to embark on a substantially more difficult and unlikely task in order to recoup their cost of production, copyright’s grant of pricing power provides these authors with a sustainably greater incentive to create.

This encouragement, facilitation, and protection of dissent is not only unavailable in the absence of copyright, it is also unattainable by the alternatives to copyright. Specifically, this paper shows that private organization, market-value protection (under either liability rules or compulsory licensing regimes), and governmental-sponsorship alternatives are inapt to protect dissenting authors. All of

¹ While there is a plurality of possible distinctions to draw between “dissenting,” “marginal,” “divergent,” and “unpopular,” for convenience sake, this paper refers to “dissenting expressions” as a board category meant to include all of the above.

these alternatives, albeit via different mechanisms, maintain majoritarian biases that silence dissenting expressions and deprive their authors of opportunities to create.

To further justify the description of copyright as a mechanism for the encouragement of dissenting expressions, the paper also responds to a line of copyright critiques which argues that copyright unduly curtails the creation of expressions because it allows current authors the ability to assert expensive ownership over too many possible expressions. In response to this line of argumentation, this paper argues that a proper conceptualization of dissenting expressions entails that this potential negative impact would, at most, restrict certain expressions in a manner that still enhances the relative voice of dissenting authors.

The function of copyright as a unique mechanism for the encouragement and protection of dissenting expressions is a feature that is normatively supported from within all justificatory theories of intellectual property. This paper shows that the encouragement of dissenting expressions via copyright is supported by consequentialist theories such as Utilitarianism and Rule-Utilitarianism. Further, the paper shows the normative support from within democratic theories, personality theories, labor-desert theories, and Distributivism.

The encouragement of dissent is not only a unique and normatively appealing advantage of copyright, it is also a function that, once uncovered, provides us with a doctrinal revelation regarding the relationship between the Copyright Clause and the First Amendment. A line of cases by the Supreme Court of the United States has asserted that contrary to prima facie appearances, the two constitutional norms are consistent and even complimentary to one another.² Focusing on copyright as a mechanism for the encouragement of dissenting views helps justify this position. While copyrights restrict speech and the First Amendment protects speech, both norms act in service of encouraging and protecting speech that would otherwise be silenced.

Structurally, this Essay unfolds as follows. Parts II, III, and IV articulate the descriptive part of this paper. Respectively, they describe copyright as a mechanism for the encouragement of dissenting expressions, as a mechanism that is unavailable under alternatives to copyright, and as a mechanism that is resilient to the critique of copyright as unduly preventative of future expressions. Part V, the normative part of this paper, shows that the function of copyright as dissent encouragement is normatively appealing from within all justificatory theories of intellectual property. Part VI, the doctrinal part of this paper, articulates the positive framework that allows us to explain and justify the doctrinal relationship between the Copyright Clause and the First Amendment. The paper ends with a few concluding remarks.

² Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 559-60 (1985); Eldred v. Ashcroft, 537 U.S. 186, 220 (2003); Golan v. Holder, 565 U.S. 302, 330-31 (2012).

II. Copyright's Encouragement of Dissenting Expressions

This part articulates the mechanism by which copyright encourages and protects dissenting expressions. Section II.A lays the foundation of this mechanism by first describing the way copyright incentivizes authors to express generally. Building on this foundational structure, section II.B shows that an overlooked feature of this incentive to express is an enhanced incentive to express dissenting expressions.

A. Copyright's General Incentive to Express

Copyright protects information goods.³ These goods exhibit nonexcludability and nonrivalrousness, which are two essential features of public goods.⁴ The objects of copyright protection are nonexcludable because, in the absence of imposed costs, once the information goods are made available to a few, it would be hard to exclude the use by others.⁵ This is so because the cost of imitating or reproducing a copy of information goods of the kind copyright was designed to protect is minimal.⁶ For example, once one has a copy of James Baldwin's "If Beal Street Could Talk," one could reproduce the book by the mere cost of using a copying machine. The objects of copyright protection exhibit nonrivalrousness because their consumption by one does not reduce the consumptive value of another.⁷ For example, the intellectual, normative, and aesthetic value one gets by reading Baldwin's "If Beal Street Could Talk" does not prevent another from acquiring the same consumptive values by reading the book. As explained below, the baseline of nonexcludability is the reason copyright provides authors the incentive to create expressions, while nonrivalrousness explains why copyright may come with an associated cost.⁸ This basic structure of copyright is referred to in the literature as the incentive-access paradigm.⁹

The following words explain why copyright, as a response to nonexcludability, provides the general incentive to author expressions. As explained above, the relatively low cost of imitating an information good makes the objects of copyright substantially nonexcludable. This feature is particularly important to consider in the context of the costs of innovating or creating the objects of copyright.¹⁰ While it is cheap to copy expressions such as a song, movie, or book, it is expensive to undergo the creative process of creating these expressions. That is to say, the objects of

³ Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1848 (2014); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 326 (1989).

⁴ Bracha & Syed, *supra* note 3, at 1848.

⁵ *Id.*

⁶ *Id.* at 1849.

⁷ *Id.* at 1848.

⁸ *Id.* at 1850–52.

⁹ *Id.* at 1843.

¹⁰ Bracha & Syed, *supra* note 3, at 1849.

copyright exhibit low costs of imitation and high costs of innovation.¹¹¹² Consequently, an author wishing to recover the costs she incurred while creating an expression will not be able to do so.¹³ This is so because, absent some protective measures, the author will be able to commercially distribute only a few copies of her expression before it is distributed at the marginal cost of imitation.¹⁴ This problem entails that without some mechanism such as copyright protection, becoming an author would be a very costly endeavor. In turn, authors would be highly discouraged to create expressive works.¹⁵ This does not mean that authorship of expressive works would cease entirely. It is more than conceivable that authors have a motivation to create expressive works even at a cost.¹⁶ The gap between the cost of innovation and the cost of imitation does mean, however, that expressive authorship would be, at the very least, substantially reduced.

It is at this very point that copyright acts as a mechanism for the encouragement of authoring expressions.¹⁷ Copyrights provide authors certain rights to exclude others, thereby increasing the cost of imitation.¹⁸ The greater the copyright protection, the more authors are able to exclude others and exercise control over the commercialization of their work.¹⁹ That is to say, copyright protection allows authors to exercise pricing power over their work.²⁰ In turn, assuming a given level of demand for the expression, there will be a level of copyright protection at which an author would be able to recoup her cost of innovation and a point at which she will be able to make a profit beyond her cost of innovation.²¹ Hence, the higher the pricing power a copyright protection provides an author, the higher the incentive an author will have to produce expressive works.

While this kind of copyright protection provides the benefit of an incentive to author expressive works, it may be doing so with an associated social cost.²² The social cost stems from the fact that the objects of copyright protection exhibit nonrivalrousness.²³ As explained above, information goods exhibit nonrivalrousness because their consumption by one does not reduce the consumptive value of another. When copyright solves the nonexcludability problem that discourages expressive

¹¹ *Id.* at 1843.

¹² For clarity's sake, the paper uses "cost of innovation" broadly to include the cost of creating an expression (both mentally and physically) as well as the cost commercializing an expression.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

¹⁷ Bracha & Syed, *supra* note 3, at 1849.

¹⁸ 17 U.S.C. §106 (2012); Bracha & Syed, *supra* note 3, at 1849.

¹⁹ Bracha & Syed, *supra* note 3, at 1849–51.

²⁰ *Id.* at 1850.

²¹ *Id.*

²² *Id.* at 1850–51.

²³ *Id.* at 1850.

authorship, it provides the author with a pricing power that prevents efficient uses of the work.²⁴ In the absence of costless and perfect price discrimination, an author charging a price which would allow her to at least recoup her cost of innovation and production would be charging a price which would be higher than the marginal cost of reproducing the work.²⁵ Since the consumption of expressive works exhibits nonrivalrousness, this exclusion of consumption at the marginal cost of reproduction would be inefficient and hence costly.²⁶ In economic terms, copyright's grant of pricing power would solve the incentive problem of nonexcludability but it will do so with an associated deadweight loss.²⁷

The familiar incentive-access paradigm, explained above, shows that copyright, while it may be associated with some social cost, encourages authors to create expressive works. At this point of the discussion, the paper draws no normative implications. Rather, the purpose of this section has been to show the way by which copyright functions as an incentive to author expressive works. With this mechanism in mind, the paper now moves to show that this incentive is enhanced in the case of dissenting expressions.

B. Copyright's Enhanced Encouragement of Dissenting Expressions

A closer examination of copyright's incentive to author expressive works reveals that this incentive is particularly strong and important in the case of dissenting or unpopular expressions.

To understand why this is the case, it is first important to describe the commerciality of dissenting expressions. Dissenting expressions do not enjoy the same demand that popular works enjoy. Expressive works which go hand in hand with the opinions, tastes, and preferences of the majority are highly marketable, while expressive works that challenge majoritarian preconceptions are marginalized. This fact can be extracted from a variety of methodologies: On the social scientific front, support for this fact can be explained by both the neoclassical and the behavioral approach to economics. On the historical analysis front, support for this fact can be traced from both the history of arts and the history of ideas (history of science, social science, and the humanities).

From a social scientific perspective, one need not choose between the neoclassical and behavioral camps in order to see why dissenting expressions operate under significantly lesser demand. From the neoclassical approach, demand is defined as the quantity of a good that people are *willing* and able to buy.²⁸ Consequently, it is almost a tautology to say that dissenting or unpopular works enjoy less demand, as

²⁴ Bracha & Syed, *supra* note 3, at 1849–51.

²⁵ *Id.* at 1850.

²⁶ *Id.*

²⁷ *Id.* at 1850–51.

²⁸ N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 68 (2d ed. 2001).

they simply go against majoritarian preferences. From the behavioral economics/sciences perspective, the lesser demand for dissenting views can be explained by both confirmation and familiarity biases. Confirmation bias is the tendency of people to favor information that confirms their previously held judgments.²⁹ Familiarity bias is people's tendency to ascribe preference or superiority to things/ideas they are familiar with.³⁰ Together, both biases lend support to the fact that expressive works which are both familiar to and confirm majoritarian beliefs and preferences would enjoy far greater demand.³¹ A practical and economically substantial reflection of these biases in the market for information goods can be found in the demand for solidarity goods. Solidarity goods are goods whose value is derived, at least in part, from joint consumption.³² Information goods such as movies, newspapers, and songs are particularly strong examples of solidarity goods.³³ This is so because people consume them not merely for their objective value, but also for the purpose of engaging with the materials that are consumed by one's respective social group.³⁴ Confirmation and familiarity biases are reflected in solidarity goods, thereby creating profound and enhanced majoritarian pressures. As people demand more goods that confirm to their groupthink, familiarity, and beliefs, the space for dissenting expressions becomes smaller and smaller.

From a historical analysis, the lesser demand for dissenting or unpopular expressive works has produced countless examples. In the history of art, one particularly dramatic example is that of Vincent van Gogh. While now considered one of the most prominent artists in history, in his lifetime he was a starving artist who was only able to sell a few of his works.³⁵ In the history of ideas, one particularly dramatic example is Spinoza's excommunication. Spinoza's philosophical and scientific ideas went against the religious ideas of his time, so much so that the community concluded that "no one should communicate with him, not even in writing, nor accord him any favor nor stay with him under the same roof nor [come]

²⁹ Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 115 (2000).

³⁰ Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 32 (2000).

³¹ This is the case also when considering expressive works that contain only aesthetic value. For example, "As neuroscientist Daniel Levitin, author of *This is Your Brain on Music* explains, 'as music unfolds, the brain constantly updates its estimates of when new beats will occur, and takes satisfaction in matching a mental beat with a real-in-the-world one.'" Samuel McNerney, *Confirmation Bias and Art*, Scientific American (July 17, 2011), <https://blogs.scientificamerican.com/guest-blog/confirmation-bias-and-art/>.

³² Cass R. Sunstein & Edna Ullmann-Margalit, *Solidarity in Consumption* 3 (Univ. of Chicago Law Sch., John M. Olin Law & Econ. Working Paper No. 98, 2000).

³³ NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX*, OXFORD UNIVERSITY PRESS 134 (2010).

³⁴ *Id.*

³⁵ Jonathan Jones, *Vincent van Gogh: Myths, Madness and a New Way of Painting*, GUARDIAN (Aug. 5, 2016), <https://www.theguardian.com/artanddesign/2016/aug/05/vincent-van-gogh-myths-madness-and-a-new-way-of-painting>.

within four cubits in his vicinity; *nor shall he read any treatise composed or written by him*” (emphasis added).³⁶

Much ink has been spilled about the marginalization, causes, and effects of dissenting or unpopular expressions.³⁷ The above provided but a glimpse into the wide penumbra of methodologies that allow us to see and explain the lesser demand for dissenting or otherwise unpopular expressive works. With this observation in mind, the following words show why copyright functions as an enhanced encouragement for the production of such works.

Dissenting authors operate under far lesser demand, and as a result, have a substantially reduced chance of recouping their cost of innovation. This is so because works that lack demand, by definition, have a reduced chance of recouping their cost of innovation. This is a noncontroversial facet of the law of demand.³⁸ By the law of demand, the higher the demand for a given good, the higher the price a seller may receive for selling that good.³⁹ Assuming a given cost of innovation, as demand for a work goes down, there will come a point at which the author of the work will not be able to recoup that cost. Since, as showed above, dissenting expressions have lesser demand, the authors of these works have a reduced chance of recouping their cost of innovation.

Consequently, absent protective measures, authors of dissenting expressions operate under a dual threat to their chance of recouping their cost of innovation. Without more, dissenting authors would have to face both the problem of nonexcludability and the problem of lesser demand. In other words, dissenting authors would have to endure the cost of innovation with less demand or likelihood of cost-coverage to begin with, as well as the threat of costless imitation should their work ever enjoy sufficient demand to cover the marginal cost of imitation.

Recall, as explained in section II.A, that while the threat of not covering one’s cost of innovation may not entirely stop the creation of expressive works, it will substantially discourage and reduce the authorship of these works. Since, absent protective measures, dissenting expressions have an even greater threat of not covering their cost of innovation, their authors would be even further discouraged. Consequently, the likelihood that dissenting expressive works will be created would be exponentially reduced.

It is at this point that copyright’s incentive to innovate has a significantly more potent function when it comes to dissenting works. Since dissenting works, absent

³⁶ Steven Nadler, *Why Spinoza Was Excommunicated*, HUMANITIES, Sept.-Oct. 2013, <https://www.neh.gov/article/why-spinoza-was-excommunicated>.

³⁷ See, e.g., Dan Kahan, *Why we are poles apart on climate change*, 488 NATURE 255 (2012); Thomas Kuhn, *The Function of Dogma in Scientific Research*, in SCIENTIFIC CHANGE (A. Crombie ed., 1963); GUTTING, G., PARADIGMS AND REVOLUTIONS (Notre Dame: University of Notre Dame Press 1980).

³⁸ Mankiw, *supra* note 28, at 67–70.

³⁹ *Id.*

protective measures, are even less likely to be created, protective measures that enhance the author's ability to cover their cost of innovation have a heightened role. Copyright, in its function as a protective measure, undertakes this heightened role precisely. By copyright's grant of pricing power, dissenting authors have an increased incentive to author expressions. Therefore, taking as a baseline the magnified disincentive of dissenting authors, copyright functions as an amplified mechanism for the encouragement and protection of dissenting works.

The above analysis showed that copyright incentivizes and protects dissent as compared to having no alternative mechanisms at all. In other words, the baseline or counterfactual point of comparison for the above analysis only considered the lack of copyright. The following Part III shows the dissent encouragement function of copyright is also unavailable in the common alternatives to a copyright regime.

III. The Inaptitude of Copyright Alternatives

Dissent encouragement, the fundamental yet overlooked function of copyright identified above, is unavailable in the common alternatives to a copyright regime. Prior to ascribing dissent encouragement as a unique advantage of copyright, the following sections show that this advantage is otherwise unavailable or severely limited. Specifically, sections III.A, III.B, and III.C, demonstrate the inaptitude of private organization, market-value protection (under either liability rules or compulsory licensing regimes), and governmental-sponsorship alternatives, respectively.

A. The Inaptitude of Private Organization

One alternative to a copyright regime is to leave the market for its own devices. The production of expressive works by the mere forces of the market has historical roots.⁴⁰ Further, technological developments such as the invention of the internet has led some scholars to the conclusion that more individuals are able to participate in the creation of expressions.⁴¹ Nonetheless, the following words demonstrate that private ordering lacks the ability to encourage and protect dissenting authors.

To a large extent, the inaptitude of the private organization alternative was already demonstrated in the analysis of Part II above. The above showed that absent copyright protection, or when the market is left to its own volition, dissenting authors would be discouraged due to both nonexcludability and lesser demand. It could be argued, however, that the above analysis did not consider specific techniques of private organization that replace or substantially diminish the need for copyright's incentivizing function. Prior to demonstrating the inaptness of private organization, the following words present the two important types of such private organizations.

⁴⁰ Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282 (1970).

⁴¹ See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

The first type of private organization shows a private mechanism that internalizes an author's pecuniary incentive to create. The second type of private organization shows a private mechanism that appears to successfully do without commercially incentivizing authors.

The first type of private ordering, which internalizes the author's pecuniary incentive, can be exemplified by the following: Authors and consumers could use a contractual mechanism whereby customers organize together and hire an author to produce a pre-ordered work.⁴² By that mechanism, an author would potentially not need the protection of copyright if the pre-order contract already promises her sufficient revenue. This mechanism is economically similar to the historic practice of art patronage.⁴³ By the patronage system, an author would be sufficiently motivated to produce a work if she was sufficiently motivated by the sponsorship of a patron.

The second type of private ordering, which operates absent the author's pecuniary incentive, can be exemplified by the existence of non-pecuniary peer-production.⁴⁴ For example, there is a substantial degree of individual participation in the free development of software (i.e. operation systems) or other materials (i.e. Wikipedia) on the internet.⁴⁵ This mechanism sheds doubt on the need for copyright's incentivizing effect because it shows substantial expressive authorship absent a pecuniary incentive.⁴⁶

Both types of private ordering fail to encourage and protect dissenting authors. The first type of private ordering fails because it tracks majoritarian demands, biases, and preferences. Given that dissenting expressions operate under lesser demand, the likelihood that a sufficient number of customers will be able to organize and pre-order a work with a sufficient incentive for the dissenting author is low. More problematically, many dissenting authors attempt to create expressions that may currently lack demand in the market but which create demand only after their content is revealed. When dealing with this kind of dissenting works, there is no reason to believe that customers would ever be willing to contract these authors before they have already created their work. The second type of private ordering may correctly point to the fact that sometimes expressive authorship is not motivated by a pecuniary gain. While it may be the case that some dissenting expressions would be created absent a pecuniary incentive, it is still the case that many such expressions would be discouraged. Moreover, it is likely that peer-produced expressions will maintain majoritarian preferences. This is so simply because peer-production requires a critical mass of participation and a large number of people are statistically likely to reflect

⁴² See, e.g., Breyer, *supra* note 40, at 302.

⁴³ See, e.g., PETER BURKE, *THE ITALIAN RENAISSANCE: CULTURE AND SOCIETY IN ITALY* (3d ed., 2014) (describing the patronage system in Italy during the Renaissance).

⁴⁴ Benkler, *supra* note 16, at 60.

⁴⁵ *Id.*

⁴⁶ *Id.*

majoritarian preferences. Unsurprisingly, for example, Wikipedia had to use special editors to try and fight the observed race and sex bias in its materials.⁴⁷

More generally, private organization cannot remedy the enhanced discouragement of dissenting expressions, as any such organization will reflect majoritarian demands, preferences, and biases. While it may be the case that some dissenting authors will continue absent pecuniary gain, the economical suicide that such undertaking would mean for these authors is likely to discourage many if not most. Therefore, private ordering would fail to include a mechanism for the encouragement of dissenting expressions. With the above in mind, the paper now moves to show the inaptness of market-value alternatives.

B. The Inaptitude of Market-Value Alternatives

The above analysis has assumed the conceptualization of copyright as a property right. An alternative to copyright as a property right is copyright protected as a liability right. Pure property rights entail that right-holders may prevent uses of their property ex ante and that an infringement on their property would entitle them to ex post damages based on the value the property holds to them.⁴⁸ Pure liability rights, on the other hand, are rights that only entitle the rights holders to market-value compensation for infringement. Copyright as it exists today is not so black and white. For example, some copyright entitlements are only protected by compulsory licensing that grants the right holder market-value compensation.⁴⁹ Liability rights may take either an ex ante or ex post form. An ex ante copyright liability rule would be a statutory compulsory licensing mechanism whereby individuals are able to infringe on one's copyright entitlement knowing that they would have to compensate the copyright holder for the fair-market value. An ex post copyright liability rule would be a rule awarding copyright holders only fair-market value compensation even after they prove infringement in a court of law. Both of these market-value alternatives to copyright qua property, as shown below, may be insufficient to encourage and protect dissenting authors.

Since copyright qua liability rule would still amount to some form of a copyright entitlement, it still maintains some degree of copyright's incentivizing effect. Consequently, copyright qua liability would maintain a reduced incentive to author expressive works and a reduced incentive to express dissenting works. At least in the case of dissenting works, however, this reduced incentive is likely to be insufficient. When it comes to dissenting works, as explained above, authors operate in a world of lesser demand. As a result, the market-value of dissenting works is far less likely to cover the cost of innovation. This means that while a copyright-liability regime may

⁴⁷ Issie Lapowsky, *Meet the Editors Fighting Racism and Sexism on Wikipedia*, WIRED, <https://www.wired.com/2015/03/wikipedia-sexism/>.

⁴⁸ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

⁴⁹ 17 U.S.C. §§ 111(d), 115(c), 116(c).

incentivize some dissenting authors, others will remain discouraged. Moreover, since many dissenting works are ones where the demand for them may only be achieved over time, a fair-market value assessment for early infringements may be exceptionally low.

To be sure, from the perspective of dissenting authors, the copyright-liability alternative is certainly better than the private ordering alternative. Since this alternative still remains a copyright, it maintains some degree of dissent encouragement. This encouragement, however, is reduced and likely insufficient given the low market-value that will be assigned to dissenting or “un-demanded” works. With the above in mind, the paper now moves to show the inaptness of government-sponsored alternatives to copyright.

The fact that the above-mentioned copyright-liability alternatives are better than private ordering alternatives reveals the following important proviso to the thesis of this article. Any of the copyright alternatives discussed thus far, but particularly the copyright-liability alternatives, may be a particularly desirable solution in local issues of copyright law. This is the case so long as the overall structure of copyright law retains its dissent-encouraging mechanism. For example, in the music industry, compulsory licensing may be a particularly suitable solution to a variety of issues arising from the technological difficulty of enforcement. Hence, it is no surprise that compulsory licensing has won over support from many interested parties, including up-and-coming artists.⁵⁰

C. The Inaptitude of Government-Sponsored Alternatives

Government-sponsored alternatives to copyright may take three general forms. One extreme form of government-sponsorship would be for the government to create expressive works itself.⁵¹ A second form of government-sponsorship is government contracting.⁵² By this approach, instead of awarding authors with exclusivity rights, the government would be contracting authors to create works that have not yet been created.⁵³ The third form of government-sponsorship is the administration of a post-hoc rewards or prizes system.⁵⁴ By this approach, also in lieu of exclusivity rights,

⁵⁰ Bruce Fan, How the Compulsory Licensing System Has Impacted Sampling in Today’s Music Industry and Potential Calls for Reform, LAW FOR BUSINESS (USC), http://lawfor-business.usc.edu/how-the-compulsory-licensing-system-has-impacted-sampling-in-todays-music-industry-and-potential-calls-for-reform/#_ftn27

⁵¹ William Fisher, *Intellectual Property and Innovation: Theoretical, Empirical, and Historical Perspectives*, available at <https://cyber.harvard.edu/people/ffisher/Innovation.pdf>

⁵² Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 972 (2012).

⁵³ *Id.*

⁵⁴ *Id.* at 973.

the government rewards authors who created desired expressions.⁵⁵ The following words demonstrate that all such forms of government-sponsored alternatives are ill-suited to encourage and protect dissenting expressions.

The inaptness of the first government-sponsored alternative is the most obvious of the three. A government of the majority will create the expressions of the majority. It is dubious at best to believe that democratically elected officials, for example, would create expressions that call into question the government itself. In other words, such a mechanism would be inherently fraught with a conflict of interest that is unlikely to produce dissenting expressions. Much more likely is the possibility that the expressions created will reflect the preferences and biases of the majority voters. Even worse is the very real possibility of governmentally produced propaganda aimed to control the opinions and beliefs of “we the people.” The inaptness of the second government-sponsored alternative tracks the same problem. If the government is responsible for deciding which authors to contract, the government would be susceptible to the same inherent conflict of interest and would hence likely only contract authors that expresses majoritarian preferences and biases.

The third form of a government-sponsored alternative, the prizes/rewards system, may be designed in a way that is less problematic than the first two forms. That is because, unlike the first two forms of government-sponsored alternatives, it may be designed in a way that doesn’t involve a value judgment on the part of the government regarding the worth of the work. In other words, it may be designed to be “content-neutral.” For example, the government may design a rewards mechanism that transfers expressive works to the public domain immediately after they are created and later compensate the authors based on market sales data and surveys.⁵⁶ This alternative would be content-neutral in the sense that it will be the market and not the government that would decide the value of the work. The government’s role in compensating authors would thus be merely administrative. Encompassing content neutrality is a more promising alternative as it alleviates some of the concerns of a biased governmental engineering of expression. Despite being more promising, however, this alternative is also ill-suited to encourage and protect dissenting authors. This is so because a closer inspection of this alternative brings back the conflict of interest and majoritarian abuse concerns identified above. Despite encompassing a degree of content neutrality, this alternative fails to avoid these issues because it asks the government to come up with a fair method of assessing social-value. While looking at sales data and surveys could in theory provide an objective assessment of social value, it is entirely unclear how to go about extracting this objective value from the facts. Consequently, entrusting the government with this discretionary task would create the very real possibility that the method of analysis the government will adopt

⁵⁵ *Id.*; see generally Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001).

⁵⁶ *Id.*

will track the very same governmental and majoritarian biases. This concern does not in some way necessitate a strong libertarian stance, it is merely the “local” institutional judgment that entrusting the government with the task of assessing the value of speech is fraught with moral hazards likely to amount to the abuse of minority expressions.

Hence, government-sponsored alternatives to copyright will fail to include a mechanism for the encouragement and protection of dissent. Therefore, this part of the paper demonstrated that the common alternatives to copyright qua intellectual property fail to include copyright’s function of encouraging dissenting expressions. With the above in mind, the paper now moves to show that copyright’s dissent encouragement function is resilient to the critique of copyright as unduly preventative of future expressions.

IV. Future Expressions: The Resiliency of Dissent Encouragement

A common line of copyright critiques argues that copyright unduly curtails the creation of expressions because it allows current authors the ability to assert expensive ownership over too many possible expressions.⁵⁷ This objection to copyright is important to take seriously because, if true, it may mean that while copyright incentivizes dissenting expressions on the “front-end,” it internally defeats its own incentive on the “back-end.” Hence, to further justify the description of copyright as mechanism for the encouragement of dissenting expressions, this part demonstrates that an adequate conceptualization of dissenting expressions entails that this potential negative impact would, at most, restrict certain expressions in a manner that still enhances the relative voice of dissenting authors. Prior to demonstrating as such, the following words further articulate the critique.

The objection to copyright as restrictive of future creative opportunities has been frequently raised in the context of considering “poor” authors.⁵⁸ The argument usually articulates the concern that authors with less resources will not have enough money to acquire the necessary copyright clearances in order to commercialize the work they have in mind.⁵⁹ We can take this line of critique and implement it in the context of dissenting expressions as well. If creative opportunities are systematically less unavailable to “poor” authors, they may also be systematically less available to dissenting authors. This does not necessitate perfect correlation between being poor and being a dissenter, it is concerning enough even if dissenting authors are equally

⁵⁷ See, e.g., Molly S. Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005); Jack M. Balkin, Comment, *Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 16–18 (2004); Yochai Benkler, Lecture, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1269–72 (2003); Shubha Ghosh, *The Merits of Ownership; or, How I Learned to Stop Worrying and Love Intellectual Property Review Essay of Lawrence Lessig, the Future of Ideas, and Siva Vaidhyanathan, Copyrights and Copywrongs*, 15 HARV. J.L. & TECH. 453, 475–82 (2002).

⁵⁸ E.g., Van Houweling, *supra* note 56, at 1537.

⁵⁹ *Id.*

distributed between the rich and the poor. Beyond the context of rich and poor, we may also understand this critique as stating that copyright creates a costly barrier to entry that hinders the creative opportunity of cumulative copyright works that cannot finance the copyright barrier (either pre or post creation).

Copyright's dissent encouraging mechanism is resilient to the above critique. A proper understanding of the nature of dissenting expressions shows that the negative impacts identified above, at worst, disproportionately restrict popular expressions, thereby enhancing the relative voice of dissenting works.

Dissenting expressions may be conceived of in three ways. One way we may conceptualize of dissenting works is as *avant-garde*.⁶⁰ In other words, we can conceive of dissenting works as unrelated or marginally related to past expressive works. A second way to conceptualize of dissenting works is as works that are related to past expressions, but less so than popular works. Lastly, a third conceptualization of dissenting works is as works that are just as related to past expressions, if not more.⁶¹

If one accepts either the first or the second conceptualization of dissenting works, the resilience of copyright's dissent encouragement can be demonstrated as follows: The cost barrier imposed by copyright makes it more expensive to create cumulative innovation that uses prior copyright material (or uses material that imposes a probability of being sued for a copyright infringement). If one accepts the conceptualization of dissenting works as *avant-garde*, however, this cost would be irrelevant. This is so because *avant-garde* works would, at most, marginally draw on prior expressive works. Hence, under this conceptualization, copyright's dissent encouraging mechanism would survive at full force. If one accepts the conceptualization of dissenting works as less related to prior expressions than popular expressions, the copyright barrier cost, by the same token, would disproportionately impose costs on popular works. In other words, the copyright cost barrier would have a diminished effect on the creation of dissenting works. In turn, this imposition of disproportionate cost would increase the ratio of dissenting expressions to popular expressions. Consequently, while the copyright cost barrier would, on the one hand, somewhat reduce copyright's dissent encouragement mechanism, it would also enhance the relative representation of dissenting expressions that are created. Hence, under this conceptualization of dissenting works, copyright's dissent encouraging mechanism would survive with a reduced incentive but with the added strength of enhancing the voice of the "surviving" dissenting authors.

⁶⁰ See, e.g., ROBERT ADLINGTON, *COMPOSING DISSENT: AVANT-GARDE MUSIC IN 1960'S AMSTERDAM* (2013).

⁶¹ See, e.g., JOHN STUART MILL, *ON LIBERTY*, CHAPTER 3: OF LIBERTY (Elizabeth Rapaport Ed., Hackett Publishing Co. 1978)(1859)(Mill famously warned of the conformity of some non-conformists.).

There are good reasons to adopt either the first or the second conceptualization. Dissenting or unpopular expressions are, almost by definition, expressions of ideas which are not commonly expressed. To be sure, it may be too fantastic to conceive of dissent as created in complete isolation from the expressions that surrounded and shaped the dissenting authors. That being said, however, it is also the very breaking of majoritarian beliefs, expressions, preferences, and biases that makes dissenting expressions different from the creation of popular ones. To attempt to fully analyze the essence of dissenting expressions would require a project of its own, one which is beyond the scope of this paper. That being said, the following words show that even for those who hold on to the conceptualization of dissenting expressions as at least as related to prior works as popular expressions, copyright's dissent encouraging mechanism can survive.

The reason copyright's dissent encouraging mechanism can survive even under the third conceptualization is as follows: Copyright may be structured in a way that alleviates the cost barriers for dissenting authors. When it comes to poorly financed authors, for example, copyright alleviates some of the creative opportunity costs, albeit only partly.⁶² The alleviation of burdens for poorly financed authors has been partly accomplished by the fair use doctrine.⁶³ This is as such because, for example, fair use prevents certain findings of infringement for poorly financed authors such as university researchers.⁶⁴ This very same mechanism can also be implemented in the context of dissenting works. In fact, one could reasonably argue that our current copyright system already partly does as much. Such an argument could, for example, point to the explicit inclusion of criticism in the fair use doctrine.⁶⁵ Therefore, even under the skeptical third conceptualization of dissenting works, copyright's dissent encouragement mechanism can survive by careful legal engineering.

Hence, copyright's dissent encouraging mechanism is resilient to the critique of copyright as unduly preventative of future expressions. The end of this section also marks the end of the descriptive part of this paper. The above showed that copyright acts as a resilient mechanism for the encouragement of dissenting expressions that is unavailable under alternatives to copyright. With this in mind, the paper now moves to show that this novel function of copyright as a mechanism for the encouragement of dissent is a feature that is normatively supported from within all justificatory theories of intellectual property.

V. Copyright & Dissent: Normative Justifications

Copyright's dissent encouraging mechanism is normatively supported from within all common justificatory theories of intellectual property. In sections V.A, V.B, V.C, V.D, and V.E, respectively, the following shows that the dissent function

⁶² Van Houweling, *supra* note 56, at 1545.

⁶³ *Id.*

⁶⁴ *Id.* at 1543; 17 U.S.C. § 107 (2000).

⁶⁵ 17 U.S.C. § 107 (2000).

is supported by consequentialist theories such as Utilitarianism and Rule-Utilitarianism, as well as by democratic theories, personality theories, labor-desert theories, and distributivist theories.

Prior to jumping into the normative analysis, it is important to note that the advantage of showing the justification for the dissent function from within all justificatory theories is twofold. First, it shows that by uncovering the mechanism by which copyright encourages and protects dissenting expressions, this paper has identified a unique advantage of copyright that all scholars, practitioners, and citizens, regardless of their previous normative commitments, have to appreciate in their respective copyright analysis. Secondly, it provides all of the respective normative camps with the necessary framework for thinking about the further implementation of the dissent function in the development of copyright law.

A. Justifications from Within Consequentialism

The following words first present and delineate Consequentialism, Utilitarianism, and Rule-Utilitarianism. Subsequently, the section moves to demonstrate how these moral theories normatively support copyright's dissent function.

By Consequentialism, I refer to any normative view that depends only on consequences. Consequentialism splits into two main theories: Utilitarianism, and Rule-Utilitarianism.⁶⁶

Utilitarianism is any consequentialist view that necessitates the acceptance of a fundamental prescription that maximizes the "good" out of consequences.^{67,68} To see how a utilitarian consideration might work in the copyright context, consider the following simplified example. Imagine that Congress is considering a proposal to eliminate the fair use provision. A utilitarian might object to this proposal on the grounds that it would cause more bad than good consequences: The utilitarian might argue that the benefits from the uses of works made possible by the fair use provision outweigh the costs of slightly reducing certain authors' incentive to create. This would be a utilitarian kind of argument/reasoning, regardless of its truth or falsity. The most dominant version of copyright-utilitarianism is the analysis of copyright in terms of market efficiency.⁶⁹ By this approach, for example, copyright is analyzed in

⁶⁶ Further/alternative conceptual divisibility is possible but is not covered in this paper. The reason is twofold: 1. Most consequentialists fall under one of these two theories; 2. There aren't versions of consequentialism to which the argument in this section does not apply to.

⁶⁷ Any definition of "good" would do. For example, a utilitarian could define "good" in some objective manner or in terms of people's preferences.

⁶⁸ This view was famously stewarded by Jeremy Bentham. See H.L.A. Hart, *BENTHAM ON LEGAL RIGHTS*, OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES), 171–201 (1973) (Describing Bentham's moral theory).

⁶⁹ See, e.g., Landes & Posner, *supra* note 3, at 326 (describing the balance struck by copyright law to promote economic efficiency while protecting creators).

terms of striking a balance between the good and bad consequences associated with the incentive-access paradigm identified in Part III above.⁷⁰ Another example is the economic analysis and suggestion of prizes as a more efficient alternative to copyright.⁷¹

Rule-Utilitarianism is a useful misnomer. Rule-Utilitarianism is Utilitarianism with the addition of a methodological prescription. The methodological prescription is to administer the utilitarian calculus at a higher level of abstraction.^{72,73} To see how a rule-utilitarian consideration might work in the copyright context, imagine that Congress is debating the same proposal presented above. A rule-utilitarian might support this proposal on the grounds that it would cause more good than bad consequences: The rule-utilitarian might argue that the legislature is not the right institution to evaluate whether fair use would cause more good than bad consequences, and that it should hence be left to judicial development to decide the extent to which fair use is a good or bad idea.

With the description of Utilitarianism and Rule-Utilitarianism in mind, the following words demonstrate the normative support for the dissent function that stems from both, in that order. The arguments from both versions of Consequentialism converge on the following point: The value of expressions, both in and of themselves and as part of a “marketplace of ideas,” is partly but substantially dependent on the existence of a plurality of competing expressions.

From the utilitarian perspective, one form of a market failure can be traced to the “free-ride problem.”⁷⁴ The free-ride problem exists when a socially advantageous and non-rivalrous good is not produced because no one individual wants to internalize the cost of producing the good which would in turn be enjoyed by all.⁷⁵ In other words, individuals would prefer to wait for others to produce the good they also want to enjoy so that they could “free-ride” on the benefits. One important example of the free-ride problem is public goods.⁷⁶ For example, while all individuals would benefit from national defense, which is a non-rivalrous good, no individual would like to internalize the cost of paying for it. In the public goods context, this issue is often

⁷⁰ *Id.* at 333.

⁷¹ *See, e.g.*, Shavell & van Ypersele, *supra* note 54, at 529–30 (deadweight loss is reduced under a reward system, which is considered economic efficiency).

⁷² An improved nomenclature calls for ‘second-order utilitarianism.’ For convenience and consistency sake this paper retains ‘rule-utilitarianism.’

⁷³ This view was famously stewarded by John Stuart Mill. *See generally* JOHN STUART MILL, UTILITARIANISM (1861).

⁷⁴ For further analysis of this economic problem in another context, *see, e.g.*, Bork, Robert H, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373, 382 (1965).

⁷⁵ Tyler Cowen, *Public Goods*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (n.d.), <http://econlib.org/library/Enc/PublicGoods.html>.

⁷⁶ *Id.*

solved by governmental coordination.⁷⁷ As explained in Part II, expressive information goods also exhibit nonrivalrousness. Hence, if we also conceive of the existence of dissenting expressions as public goods, a coordination mechanism for the creation of dissenting works would be in order.

Prior to explaining that indeed utilitarians have good reasons to conceive of dissenting expressions as public goods, it is important to notice that this economic analysis turns the traditional incentive-access paradigm upside down. By this analysis, copyright is justified also as a solution to nonrivalrousness, not just nonexcludability.

Utilitarians have good reasons to conceive of dissenting expressions as public goods because they are required in order for there to be a meaningful market of ideas. If all expressions were merely the result of majoritarian demands, then the market would not be a force for the development of expressive information products. This is because there wouldn't exist sufficient product differentiation that could attempt to shift consumer pressures towards a demand for a different sort of information goods. In other words, while all would benefit from a competition of expressions, absent dissenting expressions, this would not be possible. The marketplace for expressive works would hardly be a market at all. It is entrepreneurship in the market that eventually leads to the changing of consumer demands and market improvements. Due to the special nature of the marketplace of ideas, however, this entrepreneurship would be curtailed absent an incentive to create dissenting expressions to begin with.

Hence, the utilitarian would normatively welcome copyright's dissent function on the grounds that it is a precondition for there being a market upon which one could meaningfully design a utilitarian copyright system.

The rule-utilitarian would support copyright's dissent function on the same grounds, but the rule-utilitarian may also rely on an additional argument. A rule-utilitarian, such as John Stuart Mill, would also argue the following: Part of an individual's well-being is her development of an autonomous and meaningful character.⁷⁸ To that end, consequences that allow individuals to develop their character are important and valuable.⁷⁹ One important way one could develop her character is by meaningfully analyzing and interacting with her beliefs.⁸⁰ In order for an individual to meaningfully analyze her beliefs, one has to consider opposing views.⁸¹ In other words, one must develop a "wide reflective-equilibrium."⁸² Since, absent copyright's dissent function, the ability of individuals to consider dissenting

⁷⁷ *Id.*

⁷⁸ Mill, *supra* note 60.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² The terminology of a "wide reflective-equilibrium" is borrowed from John Rawls. See, John Rawls, *The Independence of Moral Theory*, PROC. & ADDRESSES OF THE AMER. PHIL. ASS'N 5, 8 (1974-75).

expressions would be greatly reduced, the rule-utilitarian would have an added normative reason to support copyright's dissent function.

Therefore, copyright's dissent function is supported from within Consequentialism, as was demonstrated by the arguments from within both Utilitarianism and Rule-Utilitarianism. The paper now moves to show the normative support from within democratic theories.

B. Justifications from Within Democratic Theories

Democratic theories, like consequentialist theories, are concerned with providing a comprehensive normative assessment of consequences.⁸³ Unlike consequentialist theories, however, consequences are not all that matters for democratic theories.⁸⁴ To borrow the language of Professors Bracha and Syed, democratic theories are "consequence-sensitive," but they also take other factors and values into their normative assessment.⁸⁵ Other than this structural convergence, however, democratic theories are comprised of various different theories with differing normative commitments.⁸⁶ To show that the dissent function is supported from within the main variances of democratic theories, the following words follow the useful taxonomy of democratic theories provided by Bracha and Syed.

One democratic theory variant centers around the notion of self-determination.⁸⁷ Self-determination here is related to the concepts of autonomy and self-authorship.⁸⁸ The general idea is that an important part of an individual's well-being is one's positive ability to meaningfully pursue and develop her conception of the good.⁸⁹ Further, and importantly for our discussion, an essential feature of being positively able to pursue one's conception of the good means access to speech or information goods with which one could interact as she assess her own views.⁹⁰ A related variant of a democratic theory is a theory that emphasizes the notion of political democracy.⁹¹ Political democracy theories focus on the importance of enabling individual and collective self-determination in the political space, a space which they conceive of as irreducibly social or collective in nature.⁹² Cultural Democracy, a third variant of democratic theories, extends the notion of individual and social self-determination beyond the political domain and into the cultural sphere.⁹³ Lastly, another democratic

⁸³ Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 246 (2014).

⁸⁴ *Id.* at 247.

⁸⁵ *Id.*

⁸⁶ *Id.* at 249.

⁸⁷ *Id.* at 251.

⁸⁸ *Id.*

⁸⁹ Bracha & Syed, *supra* note 82, at 251.

⁹⁰ *Id.* at 252–53.

⁹¹ *Id.*

⁹² *Id.* at 252.

⁹³ *Id.* at 253–56.

theory is the human flourishing theory.⁹⁴ This theory argues that there are certain conditions which are necessary in order for individuals to lead flourishing and meaningful lives.⁹⁵ To that end, the human flourishing theory emphasizes the importance of conditions which enable individuals to meaningfully engage with a variety of expressive works and ideas.⁹⁶

In many ways, the democratic theories presented above are similar and perhaps rooted in Mill's idea of character that was discussed in the rule-utilitarian analysis above. The democratic theories presented above, like Mill's Rule-Utilitarianism, converge on the importance of meaningful interaction with expressive works. Indeed, the analysis provided in the rule-utilitarian section also applies to the above theories. Since by the above theories an interaction with other views or expressions are essential for either character, self-determination, political life, cultural life, or human flourishing, these theories would also normatively welcome copyright's dissent function. They would welcome the function as it enables the creation of works that allow for the possibility of meaningful interaction with expressive works.

Therefore, copyright's dissent function is supported from within democratic theories. Keeping the above argument in mind, the following words also briefly show that a similar argument also applies in the context of personality theories.

C. Justifications from Within Personality Theories

Personality theories argue that intellectual property rights should be granted only for the purpose of promoting human flourishing by protecting fundamental human interests.⁹⁷ To that end, one important feature of personality theories is that intellectual property rights should be shaped to allow for self-realization as an individual and self-realization as a social being.⁹⁸ Self-realization as an individual, in this context, means that property rights may be needed in order for one to be able to assert her will and be recognized as autonomous.⁹⁹ Self-realization as a social being, in this context, means that property rights may be needed in order for one to shape the society and community in which they are in.¹⁰⁰

Personality Theory would also welcome copyright's dissent function. From the perspective of Personality Theory, the dissent function should be recognized as uniquely designed for the very purpose of self-realization. It provides individuals the ability to express when otherwise they would be silenced by majoritarian demands. It is the encouragement of dissent that allows for individuals to assert their

⁹⁴ *Id.* at 256–58.

⁹⁵ *Id.* at 256.

⁹⁶ *Id.* at 257–58.

⁹⁷ William Fisher, *Theories of Intellectual Property*, NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 186 (Stephen R. Munzer ed., 2001).

⁹⁸ *Id.* at 187.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

independent thinking and provides them with the opportunity to change the social environment they are responding to.

Therefore, copyright's dissent function is also supported from within Personality Theory. The following section shows that dissent function is also normatively supported from within labor-desert theories.

D. Justifications from Within Labor-Desert Theories

Labor-desert theories are rooted in John Locke's treatment of property.¹⁰¹ The general normative framework of the Labor-Desert Theory, as applied to intellectual property, is as follows: One may acquire property rights by mixing her labor with materials found in the commons (unowned materials, physical, intellectual, or otherwise, found in the public sphere).¹⁰² Mixing one's labor is not enough, an individual mixing her labor with the commons to create an expression (an author) will also have to satisfy two provisos.¹⁰³ The first proviso is that the author must only appropriate materials from the commons such that she avoids spoiling the materials.¹⁰⁴ The second proviso is that the author must leave "as much and as good" for others.¹⁰⁵

Intellectual property scholarship has provided a deep and comprehensive discussion regarding the applicability and interpretation of Locke's Labor-Desert Theory.¹⁰⁶ Importantly for the discussion that follows, the second proviso itself has been the subject of heated debate with various competing interpretations as to how restrictive we should understand the proviso to be.¹⁰⁷ The debate centers around a baseline question.¹⁰⁸ In one extreme, one could argue that copyrights always leave as much and as good for others, because the work would not have anyways existed had the author not created it.¹⁰⁹ On the other extreme, others could argue that once the work has been created, excluding others from using the work often does not leave as

¹⁰¹ Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138–39 (Stephen R. Munzer ed., 2001).

¹⁰² Alex Tuckness, *Locke's Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2020 Edition), <https://plato.stanford.edu/entries/locke-political/>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535–72 (1993); Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (Stephen R. Munzer ed., 2001); Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 612–23 (1993).

¹⁰⁷ Fisher, *supra* note 96, at 168–71.

¹⁰⁸ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, 178–82 (1974).

¹⁰⁹ Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1218 (1998), citing to Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 36 (1989).

much and as good for others because it deprives them of the opportunity to engage with the work.¹¹⁰

Rather than taking a stance in the internal labor-desert debate, and in order to show the copyright's dissent function is supported from within labor-desert theories, the following words show that dissenting works are presumptively better candidates for copyright protection than are popular works. When a dissenting author mixes her labor to produce an expression, her property right is just as normatively demanded as any other author, provided the provisos are satisfied. The issue is that it is not clear under what conditions a copyright satisfies or violates the "as much and as good" proviso. Regardless of one's understanding of the proviso, however, dissenting works are presumptively better candidates for protection. This is because, as explained in Part III above, dissenting works are far less likely to be created than are popular works in the absence of copyright protection. Since dissenting works are less likely to have been created in the first place, regardless of the "as much and as good" analysis one employs, dissenting works are also less likely to run afoul of the second proviso. To be sure, this is a defeasible presumption, at least in some cases. The point is, however, that given the uncertainty regarding the demands of the proviso, copyright's dissent function is one that aims towards a presumptively more compliant set of expressive works.

Therefore, copyright's dissent function is also normatively supported from within labor-desert theories. With the above in mind, the following words demonstrate the normative support from within distributivist theories.

E. Justifications from Within Distributivist Theories

Distributivism is any moral theory that holds at least one distribution of resources in a society as morally required or at least one distribution of resources as morally impermissible. As a corollary, distributivism rejects any set of rules that would allow or increase the likelihood of such a distribution.¹¹¹ For example, a famous articulation of a distributivist theory is Rawls's "A Theory of Justice."¹¹² Rawls's theory adopts distributive limitations entailed by a maximin principle.¹¹³ By the maximin principle, our system of justice should reject any set of rules/policies that does not maximize the "good" of the would-be least well-off individual.

Importantly, distributivist theories, considered in isolation, may be compatible with or derived from any of the justificatory theories described above. In fact, most distributivist accounts are a subpart of a larger normative account of property/justice.¹¹⁴ Being as such, there is a wide variety of distributivist concerns one could

¹¹⁰ *Id.*

¹¹¹ "Resources" here is broadly construed to account for both tangible and intangible goods.

¹¹² See generally, JOHN RAWLS, A THEORY OF JUSTICE (1971).

¹¹³ *Id.*

¹¹⁴ See, e.g., Lamont, Julian, *The Concept of Desert in Distributive Justice*, PHIL. Q. 45 (1994)

have about copyright.¹¹⁵ The following words certainly do not exhaust all of the distributivist concerns one might raise in this context, but they identify one particularly important distributivist concern that copyright's dissent function attempts to alleviate.

As was also mentioned in Part V above, one distributivist concern one might have is the distribution of creative opportunity.¹¹⁶ From a distributivist standpoint, it is problematic (or at least morally suspect) if dissenting authors would not enjoy the same opportunity to express, protect, and commercialize their expressive works. Hence, a distributivist would support copyright's dissent function as a welcomed solution to an otherwise unequal distribution of creative opportunities. This would be a particularly well supported function for the distributivist given the resiliency of the function in the context of future and cumulative innovation discussed above.

Therefore, copyright's dissent function is also normatively supported from within distributivist theories. This concludes the normative part of this paper. So far, the above showed that copyright acts as a resilient mechanism for the encouragement of dissenting expressions that is unavailable under alternatives to copyright. Further, the above showed that this novel function is normatively supported from within all justificatory theories of intellectual property. With this in mind, the following articulates the positive framework that allows us to explain and justify the doctrinal relationship between the Copyright Clause and the First Amendment.

VI. Doctrinal Roots and Implications

While the First Amendment guarantees the freedom of speech, the Copyright Clause provides exclusive rights that restrict speech. Consequently, the two constitutional norms appear to be contradictory to one another. In a line of important and well-known cases, the Supreme Court has wrestled with this potential issue.¹¹⁷ The Supreme Court concluded that, contrary to first appearances, the Copyright Clause and the First Amendment are compatible and even complimentary to one another.¹¹⁸ The following words demonstrate that by focusing on copyright's dissent function, we can help uncover and justify this position. While copyrights restrict speech and the First Amendment protects speech, both norms act in service of encouraging and protecting speech that would otherwise be silenced.

In the line of cases identified above, the Court has reaffirmed the following as the doctrinal relationship between the Copyright Clause and the First Amendment. While copyright is not categorically immune from First Amendment challenges, the

(exemplifying "desert-distributivism"); GOODIN, ROBERT E., *UTILITARIANISM AS A PUBLIC PHILOSOPHY* (New York: Cambridge University Press 1995) (exemplifying "consequentialist-distributivism").

¹¹⁵ See generally, Van Houweling, *supra* note 56.

¹¹⁶ *Id.*

¹¹⁷ *Harper & Row Publishers, Inc.*, 471 U.S. at 541; *Ashcroft*, 537 U.S. at 192; *Golan*, 565 U.S. at 132.

¹¹⁸ *Id.*

Copyright Clause and the First Amendment are compatible and even complementary to one another.¹¹⁹ The copyright norm, the Court has asserted, already has built-in free speech protection mechanisms. The protection mechanisms can be found in the idea/expression dichotomy and the fair use doctrine.¹²⁰ The cases cited above also stand for other legal findings, which are not of interest for our purposes. The following solely focuses on the rendition of copyright-free speech compatibility.

In justifying its compatibility finding, the Court has asserted that both the First Amendment and the Copyright Clause act as engines of free expression.¹²¹ The Court sees both constitutional norms as sharing the purpose of promoting the wide dissemination of expressions.¹²² Intellectual property scholars, however, have expressed serious doubts on the compatibility of the two norms.¹²³ These challenges have been internal to the current copyright system; they have pointed out the issues and limitations of the idea/expression dichotomy and the fair use doctrine as safeguards of free speech.¹²⁴ This paper takes no position on the question of whether the current implementation of copyright is exactly right in this regard. Rather, the paper shows that copyright's dissent function clarifies the general compatibility with the First Amendment. It could very well be the case that some specific copyright laws need tweaking, but the general compatibility of the two norms, as shown below, still stands.

One of the most important and essential features of the First Amendment is that it's not only an engine of speech, it is a neutral engine of speech. In the words of the Court: "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹²⁵ The explicit reason behind the emphasis on content-neutrality is the creation of a robust debate in the public sphere. As noted in *Sullivan*, this is due to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹²⁶ Copyright's dissent function serves this very purpose.

It is one thing to note that both copyright and the First Amendment incentivize and allow for free expression (respectively), but it's another thing to explain why this is the case. The mere "engine of speech" rational, by itself, is incomplete. After all,

¹¹⁹ *Ashcroft*, 537 U.S. at 221.

¹²⁰ *Golan*, 565 U.S. at 328.

¹²¹ *Id.*

¹²² *Ashcroft*, 537 U.S. at 221.

¹²³ See, e.g., Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL'Y 273, 282 (2009); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 396–97 (1989).

¹²⁴ Bunker, *supra* note 122, at 282; Yen, *supra* note 122, at 396–97.

¹²⁵ *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

¹²⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

copyright may incentivize some speech, but it also restricts other speech. In isolation, it is not clear that this is enough to amount to compatibility with the First Amendment. For example, no one would support a law that awards people money as well as the right to prevent others from making political blogposts merely for expressing a particular political view. While this law would certainly incentivize some speech, it would also amount to a particularly troubling silencing of other speech. Hence, in order for the engine of speech rational to be complete, it must be supplemented in a way that ties it to the essential purposes behind the free speech norm. Copyright's dissent function does just that.

Copyright's dissent function is not just an engine of speech, it is an engine of expressions that would otherwise not be spoken. As explained above, it is an engine that incentivizes the creation of dissenting and unpopular expressions into the marketplace of ideas. Consequently, to mirror the language of the Court, it answers the First Amendment's most basic demand of an essential national commitment to a robust public debate.¹²⁷ It is in this way that the Copyright Clause and the First Amendment are compatible. Both serve the purpose of incentivizing and protecting speech that would otherwise not be spoken, both serve to protect a content-neutral commitment to a robust public debate.

Therefore, it is copyright's mechanism for the encouragement and protection of dissenting expressions that helps clarify the doctrinal treatment of the two constitutional norms as compatible and even complimentary.

VII. Conclusion

By uncovering copyright's dissent function, this paper has identified that copyright includes a novel mechanism for the encouragement of dissent that is unavailable under alternatives to copyright. Moreover, the paper showed that this function is normatively appealing from within all justificatory theories of intellectual property. Lastly, the paper showed that it is this very function, copyright's dissent function, that allows us to explain and justify the doctrinal compatibility of the Copyright Clause and the First Amendment.

¹²⁷ *Id.*