BEYOND THE COPYRIGHT CRISIS: PRINCIPLES FOR CHANGE

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Copyright law is in crisis. The media, from print to the Internet, have put increasing pressures on this law. In turn, it has become more and more complicated and less and less reliable, while losing legitimacy. In this essay, we shall venture ten principles, trying to see our way clear of the crisis. We shall conclude with changes that these principles suggest.

I. INTRODUCTION: CRISIS

In theory, the crisis has been brewing in copyright law for centuries. Most notably, rights have proliferated and expanded, but only to enter into tensions with each other, as well as with limitations and exceptions. In practice, this crisis is now keenly felt in the difficulties that this law has in dealing with the Internet. To start, we shall trace how tensions have arisen in theory and how the crisis has come to a head in practice.[1] We shall also indicate how principles might help us advance toward resolutions.

[1] *See generally* Paul Edward Geller, *Dissolving Intellectual Property*, 28 EUR. INTELL. PROP. REV. 139 (2006) (tracing the crisis in intellectual property from the eighteenth century to the present).

A. Tensions in Theory

Copyright is supposed to protect cultural creations that are hard to fence and easy to share. Food for the body seems a private good: once you eat it, others can't; food for the mind seems a public good: once you enjoy a poem or a painting, others can as well. Indeed, copyright law appeared in history only after media progress broke through a certain threshold in facilitating access to cultural creations, that is, in making such creations increasingly public goods.[2] In the Roman Empire, the threshold had not yet been crossed: slaves transcribed literature and replicated art objects on industrial scales but by hand, so that any competitor had to pay the costs of buying and maintaining slaves to make copies. Starting in mid-fifteenth-century Europe, print allowed texts and images to be reproduced cheaply enough that competitors could undercut the prices of initial publishers and still turn profits. For example, Diderot's *Encyclopédie*, a massive and key text in the eighteenth century, one richly illustrated with images, was ruthlessly pirated.[3]

Let us quickly survey how copyright law, as we know it, emerged. Precopyright laws, for example, the English Stationers' regime starting in the sixteenth century, entitled some competitors to have others stopped from publishing.[4] The British Statute of Anne of 1710 granted authors exclusive and assignable rights to "print" their "books," as well as remedies for unauthorized importing and marketing.[5] This pioneer copyright act stated its aim as the "encouragement of learning," and the U.S. Constitution mandated copyright legislation with a broader aim: "to promote the progress of science."[6] In the eighteenth century, courts and commentators also justified granting authors "property" in "copies" by invoking the theory that creative labors were transubstantiated in the copies.[7] The French Laws of 1791 and 1793 recognized authors' rights to control the public staging and the distribution of copies of "productions of the mind," while

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[2] For analysis of relative public goods and cites to further sources, see Christopher Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007).

[3] *See* ROBERT DARNTON, THE BUSINESS OF ENLIGHTENMENT: PUBLISHING HISTORY OF THE *ENCYCLOPÉDIE*, 1775–1800 ch. 4 (1979).

[4] For historical analysis, with cites to further sources, see Paul Edward Geller, *Copyright History and the Future: What's Culture Got to Do with It?*, 47 J. COPR. SOC'Y 209, 210-35 (2000).

[5] Statute of Anne, 8 Anne, ch. 19, § 1 (1710) (Eng.).

[6] *Id.* Preamble; U.S. CONST. art. I, § 8, cl. 8.

[7] *See generally* BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911 chs. 1-2 *passim* (1999) (analyzing how the labor theory of property influenced early copyright law).

premising such rights as "sacred property."[8] In the nineteenth century, continental European courts and commentators went on to develop moral rights to attribution of authorship and to respect for the integrity of works.[9] Starting in 1886, the Berne Convention began to contemplate translation rights that became components of the emerging rights of prior authors to control works derived from their own.[10] The twentieth century has seen the multiplication of rights "neighboring" or related to copyright, for example, rights in performances and recordings.[11]

The growth of copyright law has inexorably impinged on basic interests in freedom of expression and privacy. Starting in the sixteenth century, the Stationers' charter mandated their Company to suppress prohibited books, and the French Crown increasingly policed the book trade for that purpose as well.[12] Pioneer copyright laws, such as the British Statute of Anne of 1710 and the French Laws of 1791 and 1793, severed the umbilical cords of prior regimes with state-run censorship schemes. But, as just noted, starting in the late nineteenth century, armed with rights in derivative works, earlier authors could limit the freedom of

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8 Law of January 13/19, 1791, art. 3, *and* Law of June 19/24, 1793, arts. 1, 7, *accompanied respectively by the* Reports of Le Chapelier and of Lakanal, *in original texts and translated in* J.A.L. STERLING, WORLD COPYRIGHT LAW 1002-07 (1998). For background, see BERNARD EDELMAN, LE SACRE DE L'AUTEUR pt. 4 (2004).

9 *See generally* I:1 STIG STRÖMHOLM, LE DROIT MORAL DE L'AUTEUR 196 (1966) ("It was by the detour of the theoretical elaboration of the concept of 'rights of personality' . . . that German doctrine, so to speak, 'discovered' moral right while French law, coping with the facts, found it in equitable solutions in the cases.").

10 For the debates on the Berne translation right, see *Records of the First International Conference for the Protection of Author's Rights Convened in Berne, 1884*, *in* WORLD INTELLECTUAL PROPERTY ORGANIZATION, 1886 – BERNE CONVENTION CENTENARY – 1986, at 83-135 *passim* (1986). For background on the rise of derivative-work rights, see Paul Goldstein, *Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany*, 14 INT'L REV. INDUS. PROP. & COPYRIGHT L. 43 (1983).

11 *Compare* Adolf Dietz, *Transformation of Authors Rights, Change of Paradigm*, 138 REVUE INTERNATIONALE DU DROIT D'AUTEUR [R.I.D.A.] 22 (1988) (justifying, beyond authors' rights, neighboring rights to prompt investment in media productions), *with* Jerome H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997) (critiquing copyright-related rights in database contents as restricting access to facts that copyright law leaves free for research and creative purposes).

12 *See* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 29 (1968); LUCIEN FEBVRE & HENRI-JEAN MARTIN, THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450–1800, at 239-47 (Geoffrey Nowell-Smith & David Wootton eds.; David Gerard trans., 1976).

later authors to express themselves in reworking prior works.[13] Go on to a more subtle matter: copyright doctrine has displayed an endemic blindspot toward the privacy interests of others, above and beyond the interests of authors themselves in controlling initial disclosure. In precopyright law, the Stationers, for example, would search homes as well as adjacent workshops and storehouses for unlicensed copies and illicit presses that they would seize or destroy.[14] The need for such invasive relief seemed obvious: to protect easily misappropriated works, infringement could be policed in private, before infringing copies hit the public marketplace. Only in the eighteenth century did the Enlightenment clearly distinguish the private from public spheres, which ranged from the home, through small groups, to the marketplace.[15] But the already practiced hand of copyright law never took systematic account of what the newer hand of privacy law would eventually try to do. At best, copyright lawmakers excused private uses in cases that were in any event hard to monitor, such as private study, research, and performance.[16] Enforcing property in works wherever located, copyright law has remained doctrinally bereft of any criterion for limiting its own reach into the private sphere. We now find copyright relief extending into the innards of our personal computers.[17]

We shall move beyond the old argument that more protection for authors and media entrepreneurs increases their market incentives to bring us more creations.[18] Authors' motives range from prospects of market gain and personal glory to the thrills of breakthrough creation, and only media entrepreneurs' incentives are easily boiled down to market prof-

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13 *See supra* text accompanying note 10.

14 *See* PATTERSON, *supra* note 12, ch. 3; ADRIAN JOHNS, THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING 128-36 (1998).

15 For background, see JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY chs. 2-3 (Thomas Burger trans., 1989); MICHAEL MCKEON, THE SECRET HISTORY OF DOMESTICITY: PUBLIC, PRIVATE, AND THE DIVISION OF KNOWLEDGE chs. 4-5 (2005).

16 *See*, *e.g.*, EUGÈNE POUILLET, TRAITÉ THÉORIQUE ET PRATIQUE DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ET DU DROIT DE REPRÉSENTATION 601 (3d ed. 1908) ("A copy made as a [private] study is exempt from remedies for infringement."). *But cf.* Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198-207 (1890) (finding, in authors' common-law copyright, clues to a general right of privacy).

17 *See*, *e.g.*, Julie E. Cohen, *Overcoming Property (Does Copyright Trump Privacy?)*, 2003 U. ILL. J.L. & TECH. POL'Y 375 (critiquing the widespread opinion that copyright claims may often support intrusions into privacy); Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 263-335 *passim* (2004-5) (analyzing legislation, self-help, and case law on point).

18 For critical analysis of this argument in sophisticated form, see Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. (Dec. 2007), *available at* http://www.bepress.com/rle/vol3/iss3/art2.

its.[19] The sheer variability of creative dynamics rather calls for our elaborating a more flexible copyright regime than we have wrought by multiplying and strengthening rights to make and market media productions.[20] Before embarking on such a project, return for a moment to our doctrinal roots: Locke and Kant laid out general theories of law, which have respectively framed the regimes of copyright and of authors' rights.[21] While Locke justified securing property in the fruits of one's labor, thus incentives to produce more wealth, his proviso limited property for each claimant so that "enough, and as good [would be] left" for others to appropriate.[22] Kant articulated the categorical imperative to govern the autonomy of each of us relative to everyone else in society as a whole, so that "the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."[23] Following Locke, Anglo-American law instituted copyright as alienable property to provide incentives to enhance cultural wealth; following Kant, Continental European law deemed some authors' rights to be inalienable in recognition of creative autonomy.[24] To begin to see how these rationales can be reconciled in practice, consider the truism that culture is enriched as it is fed back for each of us autonomously to elaborate. We rework others' creations more or less in private, and we in turn feed our reworkings back into culture insofar as we are free to express ourselves publicly.[25]

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19 For empirical analysis, with cites to further sources, see Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151, 1177-92 (2007).

20 *See*, *e.g.*, Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 423-36 (2002) (approaching variable incentives by contemplating legal frameworks to facilitate networking creators).

21 Locke only implicitly applied his theories to copyright. *See* Justin Hughes, Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies), Benjamin N. Cardozo School of Law, Jacob Burns Institute (Oct. 2006), Cardozo Legal Studies Research Paper No. 167, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936353. But Kant did expressly treat authors' rights. *See* Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books* (1785), *in* PRACTICAL PHILOSOPHY 29 (Mary J. Gregor ed. & trans., 1996).

22 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 21 (C. B. Macpherson ed., Hackett Publ. Co. 1980) (1698/1764).

23 IMMANUEL KANT, THE METAPHYSICS OF MORALS (1797), *in* PRACTICAL PHILOSOPHY, *supra* note 21, at 387.

24 For further analysis, see Paul Edward Geller, *Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?*, *in* OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 159 (Brad Sherman & Alain Strowel eds., 1994), *revised as* Paul Edward Geller, *Toward an Overriding Norm in Copyright: Sign Wealth*, 159 R.I.D.A. 2 (1994).

25 For another analysis, see Jed Rubenfeld, *Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 30-46 *passim* (2002).

How to delimit copyright to avoid putting such feedback, as well as privacy and free expression, at risk? Confronted by growing rights in the field, judges in the nineteenth century began to develop limiting doctrines. In early U.S. case law, Justice Story, after noting that establishing copyright scope in hard infringement cases could call for "evanescent" distinctions, opined that an equitably flexible defense of "fair use" might be in order.[26] As derivative-work rights arose, common-law and most civil-law courts and commentators began to clarify that such rights ought not apply to the takings of ideas or facts, but only to translations or transformations of expressions, while in some civil-law systems a doctrine of free utilization arose to serve the same end.[27] With the introduction of industrial designs, courts developed further limiting doctrines to preclude invoking copyright to exercise monopolies over techniques incorporated in products.[28] Jurisprudence in diverse regimes has explored different approaches to limiting alienable economic rights or inalienable moral rights, or both, in order to coordinate these rights.[29] In addition, lawmakers have elaborated a panoply of ad hoc exceptions for specific uses that, falling on the borderlines of the marketplace, now range from quotation to research.[30]

Let us then recapitulate key tensions in our field. There are tensions between rules governing copyright and authors' rights. Some rules make copyright alienable to furnish market incentives; other rules make some authors' rights inalienable to assure creative autonomy.[31] Quite different tensions cut across both regimes: plaintiffs assert proliferating and expanding rights, and defendants respond with broadly sweeping limiting doctrines or narrow exceptions: all too often, in hard cases, all-or-nothing outcomes result rather unpredictably. Courts are asked to determine either infringement, with all its attendant remedies, or non-infringement, with no relief at all, or else infringement excused by a complete defense,

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26 Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass 1841) (No. 4901).

27 *See generally* IVAN CHERPILLOD, L'OBJET DU DROIT D'AUTEUR 143-81 *passim* (1985) (comparing U.S. idea-expression and French idea-form distinctions to the German doctrine of free utilization).

28 *Compare* Jerome H. Reichman, *Design Protection and the New Technologies: The United States Experience in a Transnational Perspective*, 30 INDUS. PROP. (Part I) 220, (Part II) 257 (1991) (comparing the separability doctrine in U.S. and other laws), *and* Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921 (2007) (focusing on the U.S. statutory exclusion of ideas, methods, systems, etc.).

29 For examples, see national chapters § 7, *in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Paul Edward Geller ed., 2007).

30 For examples, see national chapters § 8[2], *in id*.

31 For further analysis, see Geller, *Between Marketplace and Authorship Norms*, *supra* note 24, at 170-74, 191-99; Geller, *Overriding Norm in Copyright*, *supra* note 24, at 24-29, 64-93.

again with no relief.[32] Hard cases, in which courts vacillate between granting and refusing injunctions, ultimately between imposing and excusing liability, are symptoms of the copyright crisis.

B. The Crisis in Practice

Return to the fact that media progress tends to make cultural creations into public goods.[33] The Internet now promises to deliver cultural creations as virtually perfect public goods. But it remains controversial to what extent this latest lurch forward in media progress represents a crisis for copyright or an opportunity for culture.[34] On the one hand, if copyright law grants authors control over partially public goods, its task might be made all the harder by the availability of more perfect public goods. As cultural creations become ever-more easily redisseminated, claimants more frequently reach the point where it is no longer cost-effective to enforce copyright or authors' rights. On the other hand, it seems that culture might be all the more enriched by the more massive and rapid feedback of cultural creations online.[35]

Consider this trend in as large a time scale as possible. Start with small tribes or villages, in which members convey information to each other by word of mouth.[36] One member might gossip with another, who in turn might talk with still another, and so on, or all might meet together to deliberate or to celebrate. Now move forward to historical examples of more complex networks: in ancient empires, literate elites, monopolizing esoteric writing systems, imposed orders from the top down; among classic Greek and Roman city-states, citizens shared public fora and phonetic writing; in modern nation-states, printing and then telecommunication

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[32] *See*, *e.g.*, David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use,* 66 LAW & CONTEMP. PROBS. 263 (2003) (illustrating vacillations in fair-use case law).

[33] *See supra* text accompanying notes 2–3.

[34] *Cf.* James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997) (arguing that making a cultural opportunity of the Internet turns on rebalancing rights and limitations within copyright law).

[35] *Cf.* Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, *in* THE COMMODIFICATION OF INFORMATION 107 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002), *also in* 4 FIRST MONDAY 1 (Aug. 2, 1999), *available at* http://firstmonday.org/issues/issue4_8/moglen/index.html (arguing that networked media enhance creativity but undercut any copyright regime).

[36] *See* ROBERT REDFIELD, THE PRIMITIVE WORLD AND ITS TRANSFORMATIONS ch. 1 (1953).

have networked us more broadly.[37] A number of terms call for definition here: to start, a "node" is each point in a network where information is received or transmitted; a "hub" is any node to the extent that it links with other nodes. As fewer nodes serve as hubs communicating to other nodes, networks tend to be centralized; as more so serve, to and from others, networks tend to be distributed.[38]

We can now better explain how cultural creations are becoming virtually perfect public goods. In modern times, indeed until quite recently, media entrepreneurs have served as the major hubs for culture. Publishers have fabricated and sold books on the public marketplace, and impresarios have staged performances for the public. The capital investment needed to publish copies started to drop with the advent of print, and the costs of conveying live performances to the public began to fall with film, radio, and television. Such costs have recently begun to approach point zero: digital dissemination does not have such creation-by-creation start-up costs as setting print, shooting a film, or organizing a broadcast.[39] Postmodern creators, without recourse to publishers or impresarios, can act as hubs on the Internet: there they can more easily sample and modify others' creations, collaborate on new team creations, and deliver their creations directly to users. By the same token, users at unauthorized hubs can recirculate others' creations, with little or no capital costs. The Internet inevitably shades into the so-called darknet and, in turn, is fed from the more shadowy recesses of cyberspace. As a result, cultural creations increasingly serve as more perfect goods.[40]

Copyright lawmakers have been busy trying to find solutions to this crisis, but not without getting caught up in legislative imbroglios. Doctrinal confusions in copyright law have not helped the legislators as they have reacted to conflicting industry and public pressures. For example, they have been misled by the conventional wisdom to the effect that "[t]he right of reproduction [of material copies] is one of the most important

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37 For a pioneer analysis, see HAROLD A. INNIS, EMPIRE AND COMMUNICATION 12-16, 32-36, 59-106 *passim*, 143-166 *passim* (David Godfrey ed., Press Porcépic 1986) (1950).

38 For a pioneer analysis, see Paul Baran, *History, Alternative Approaches, and Comparisons*, Paper No. RM-3097-PR, *in* RAND CORPORATION, ON DISTRIBUTED COMMUNICATIONS SERIES (1964), *available at* http://www.rand.org/publications/RM/baran.list.html.

39 For further analysis, see Geller, *Copyright History*, *supra* note 4, at 236-40.

40 For a pioneer analysis, see Peter Biddle et al., *The Darknet and the Future of Content Distribution, in* DIGITAL RIGHTS MANAGEMENT WORKSHOP 2002, 155 (Joan Feigenbaum ed., 2003), *available at* http://www.dklevine.com/archive/darknet.pdf.

components of copyright."[41] Of course, reproduction remains an important focus of copyright remedies, but only to the extent that creations continue to be exploited in the guise of hard copies: we have noted, for example, that hard copies have long been confiscated in workshops and storehouses before they could hit the streets.[42] However, it is not easy to apply the reproduction right to volatile copies stored or manipulated inside our computers or made available on the Internet, no more than that right could have been workably enforced in our private studies and studios. In recent legislation, our copy fetish has led to formulating the reproduction right in blanket terms that are in turn hedged by complexly conditioned exceptions, for example, for private and transient electronic copies. Such tactics overload already complicated structures of exceptions that have evolved to exempt borderline cases, such as quotation and research, from liability. At the same time, invasive copyright remedies have been reinforced.[43]

Copyright claimants are also trying self-help measures in response to this crisis. They can employ technological safeguards, such as encryption or embedding data, to control dissemination. They can also call on media services to take-down or otherwise block purportedly infringing materials that the services are to carry. It is uncertain to what extent technological safeguards might make it unnecessary to rely on copyright law at all, or whether they might merely complement copyright law.[44] On the one hand, users might hack through technological safeguards; on the other, entrepreneurs deploying such safeguards might augment their control of cultural creations, short-circuiting copyright limitations and exceptions, while turning creations back into private goods. In responding to such uncertainties, legislators have made their imbroglios more inextricable,

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[41] WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 228 (1980).

[42] *See supra* text accompanying note 14.

[43] *See*, *e.g.*, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, art. 5, 2001 O.J. (L 167), 10, 16-17 (imposing exceptions for private copying, transient reproductions, etc.); Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, art. 9, 2004 O.J. (L 195), 16, 22 (expanding remedies of seizure that may be imposed ex parte in some cases).

[44] *Compare* Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CINCINNATI L. REV. 741 (2001) (contemplating the eclipse of copyright law by technological safeguards), *with* Alexander Peukert, *A Bipolar Copyright System for the Digital Network Environment*, 28 HASTINGS COMM. & ENT. L.J. 1 (2005) (contemplating parallel systems of copyright and of technological safeguards).

notably by multiplying sanctions for circumventing technological safeguards. At the same time, they have charged bureaucrats and judges with the task of trying out procedures to spare copyright limitations and exceptions from the impact of the safeguards.[45]

What is to be done? Creators might, to complement marketing strategies in old media, adopt new ones in digital media, such as offering free samples or piece-meal releases of their creations online to tease out demands or to foil wholesale takings.[46] In any event, copyright claimants might well incur increased costs in technologically safeguarding their offerings in digital media and in policing their rights online, and users might well lose privacy when so policed.[47] At the same time, copyright statutes have become more and more complicated and less and less reliable in response both to the theoretical tensions outlined above and to the practical challenges just broached for new media.[48] As a result, for lay people, such law has become ever-harder to understand and thus ever-less legitimate, only compounding the crisis within the law itself. We shall move toward solutions by venturing principles to help courts reach decisions more in line with the rationales of this law.

C. Why Try New Principles?

Here we find ourselves caught in an old debate on legal method. Some jurisprudes would have judges apply the letter of the law or exercise discretion in hard cases where the law displays gaps; others would have judges follow principles that govern the law as a whole.[49] Two centuries ago, Portalis, the chief drafter of the French Civil Code, confronted hard cases head on, acknowledging that statutes are inevitably formulated using open-ended notions and, so drafted, can be difficult to apply to unforeseen

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[45] *See*, *e.g.*, Jerome H. Reichman, Pamela Samuelson, & Graeme B. Dinwoodie, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyright Works*, 22 BERKELEY TECH. L.J. 981 (2007) (proposing an overriding judicial procedure to hear demands to have permissible uses, otherwise prevented by technological safeguards, enabled by copyright claimants or third parties).

[46] For further analysis, see Diane L. Zimmerman, *Living Without Copyright in a Digital World*, 70 ALB. L. REV. 1375 (2007).

[47] *See generally* Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1 (2006) (explaining how technological self-help can bring with it the invasion of privacy).

[48] *See supra* text accompanying notes 31–32 & 41–45 *passim*.

[49] *Compare* H.L.A. HART, THE CONCEPT OF LAW ch. 7 & Postscript *passim* (2d ed. 1994) (stressing discretion), *with* RONALD DWORKIN, *Hard Cases*, *in* TAKING RIGHTS SERIOUSLY 81 (1978), *and* Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1 (2004) (stressing principles).

circumstances.[50] To decide hard cases, Portalis concluded, "judges and commentators, imbued with the general spirit of the laws," have to apply the law in the light of "maxims," as well as of "decisions and doctrines," that is, of principles.[51]

We have approached such principles historically in our field. Copyright law arose to provide authors and media entrepreneurs with incentives to enhance culture by protecting the fruits of creative labors, and the law of authors' rights further protected creative autonomy.[52] Such aims have remained with us as modern publishers and impresarios, mediating between authors and users, give way to post-modern creators networked both among themselves and with users. Hence the question: within evermore distributed networks, what rights would best entitle us to receive and to reprocess information and then to relay resulting creations on to others? We propose the following criterion, which allows for incentives but which stresses autonomy: such rights should allow us, not only to act as nodes and processors in networks, but to act as hubs as well for information that we creatively reprocess.[53]

As copyright laws have evolved, a core creator's right, complying ever-more closely with our criterion, has emerged, *de lege ferenda*. We have seen the British Statute of 1710 institute a right to print, later extended to all reproduction, while the French Laws of 1791 and 1793 recognized rights of performance and marketing copies.[54] Jumping centuries forward to the WIPO Copyright Treaty, we find the right of "communication to the public," which may be characterized as including other compo-

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[50] *See* Jean-Étienne-Marie Portalis et al., *Discours préliminaire prononcé lors de la présentation du projet de la commission du gouvernement* (1804), *in* NAISSANCE DU CODE CIVIL, LA RAISON DU LÉGISLATEUR 35, 41-43 (P. Antoine Fenet & François Ewald eds., 1989). *See generally* Ejan Mackaay, *Les notions floues en droit ou l'économie de l'imprécision*, 53 LANGAGES 33 (1979) (arguing that open-ended statutory notions effectively delegate lawmaking powers to judges).

[51] Portalis et al., *supra* note 50, at 42. *Compare* GUIDO CALABRESE, A COMMON LAW FOR THE AGE OF STATUTES ch. 9 (1982) (favoring the judicial revision of statutes to fit them within the law as a whole), *with* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY ch. 6. (William Rehg trans., 1996) (contemplating judicial review in both more and less constitutional terms).

[52] *See supra* text accompanying notes 4–11 & 18–25.

[53] For another analysis, see YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 154-75 *passim* (2006).

[54] *See supra* text accompanying notes 5–8. *Cf.* BERNARD EDELMAN, DROITS D'AUTEUR DROITS VOISINS: DROIT D'AUTEUR ET MARCHÉ 76-77 (1993) (noting that it becomes increasingly difficult to distinguish the right of reproduction as a conceptually self-standing right to the extent that what started as the performance right is extended to ever-more media).

nent rights under copyright.[55] This so-called umbrella right prefigures our core creator's right, which we shall so define that acts of making copies fall under it only to the extent that they feed into predicate acts of dissemination to members of the public.[56] Not only will this conceptual tactic moot the need for making exceptions such as those for private or transient copying, but it will disqualify copyright and authors' rights as grounds for intruding into the private sphere merely to control copies made there.[57]

We shall tie the core creator's right, with all its component rights, more tightly into limitations and exceptions to rights.[58] Consider Article 13 of the TRIPs Agreement, which obligates lawmakers to confine such limitations and exceptions "to certain special cases" that neither "unreasonably prejudice the legitimate interests of the right holder" nor "conflict with a normal exploitation of the work."[59] We shall start by precluding the core right, as a matter of principle, from being exercised by earlier creators to prejudice later creators' self-evidently "legitimate interests" in freely making their own creations, even out of prior works, and in freely disseminating their own creations. Thus self-limited, the core creator's right will guide fashioning injunctions with new precision: in protecting moral rights, courts may largely compel referencing creators and their creations; in protecting economic rights, courts may stop the dissemination only of routine copies. Another principle will sort out borderline cases

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55 WIPO Copyright Treaty, art. 8 (adopted Dec. 20, 1996, effective Mar. 6, 2002), *available at* http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html. *But cf.* MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION 493-510 *passim* (2002) (noting that this "umbrella" right of communication may, but need not, include the distribution right).

56 For another proposal, see JESSICA LITMAN, DIGITAL COPYRIGHT 176-95 *passim* (2001).

57 For the doctrinal blindspot in this regard, see *supra* text accompanying notes 14–17.

58 For another analysis, see Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trademark*, 2008 MICH. ST. L. REV. (forthcoming 2008) (draft on file with author).

59 Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPs], art. 13 (Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed April 15, 1994), *available at* http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm. Note that the TRIPs Agreement here addresses only legislators who, in incorporating its article 13 without change into statutory terms, would not seem to carry their burden of specifying rights and duties in language comprehensible to citizens. For critical analyses of derivative E.C. provisions, see Thomas Heide, *The Berne Three-Step Test and the Proposed Copyright Directive*, 21 EUR. INTELL. PROP. REV. 105 (1999); Christophe Geiger, *The Three-Step Test, a Threat to a Balanced Copyright Law?*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 683 (2006).

subject to exceptions: users need to be told in generic terms, understandable by recourse to common sense alone, what they may do with copyright materials. Users just do not have the economic expertise to apply the TRIPs test of avoiding conflicts with "normal exploitation."[60]

Given our core right, nothing stops creators or media entrepreneurs from using technological safeguards to control the dissemination of their creations, no more than the law could stop any of us from sending a *billet-doux* in code to a paramour. Further, claimants may notify media services of infringing materials, throwing the burden onto these services of deciding whether to stop dissemination of the materials. But questions remain open: should technological safeguards, such as encryption, have to take effect by virtue of their own efficacy? If not, to what extent should the law intervene to guarantee their effects, notably against circumvention?[61] On what showings should media services be compelled to block access to cultural creations? Bear in mind that our core right will not justify injunctions to stop others from disseminating their own creations. Hence a further principle: the law may not enforce self-help measures applied to block non-enjoinable uses.[62]

Why venture new principles across our field? We shall thus seek insight into the overall logic of copyright and authors' rights. By laying out and coordinating principles, we shall highlight how this logic controls moving from rationales to relief, thus helping to tailor remedies more coherently and cost-effectively.[63] For example, injunctions are not to frustrate

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[60] Note that this TRIPs test presupposes some standard reflecting a minimally stable media marketplace. Such a standard was perhaps easy to imagine a century ago, but it has become increasingly problematic as media progress has accelerated. Copyright law may well govern content-providers in dynamic media markets, but it is not necessarily adapted to govern cross-industry tensions, for example, between content- and equipment- or service-providers. Cross-industry tensions inevitably arise upon the creative destruction wrought by technological and entrepreneurial innovation. For background, see JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY ch. 7 (Harper Torchbooks 1962) (3d ed. 1950).

[61] For another analysis, see Ejan Mackaay, *Intellectual Property and the Internet: The Share of Sharing*, *in* COMMODIFICATION OF INFORMATION, *supra* note 35, at 133.

[62] For another analysis, see Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998).

[63] To the extent that principles enable courts to fashion much the same relief in similar cases, no matter what the legislation technically applicable, they may help to moot conflicts of laws as false, notably in Internet cases potentially subject to laws worldwide. For further analysis, see Paul Edward Geller, *Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues*, 51 J. COPR. SOC'Y 315 (2004); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000).

self-expression, but to be focused on plagiarism and piracy strictly construed, while monetary awards are to be made available where damages or profits are worth suing for. To the extent that principles suffice to guide courts and claimants for such purposes, we may ask why we need still more legislation in our field.[64]

II. TEN TENTATIVE PRINCIPLES

Let us anticipate the path that our project will then take. We shall begin with three definitional principles to delimit the core creator's right. These principles will then be elaborated into a pair of remedial principles to vindicate creators' moral and economic rights. Further, we shall propose a limiting principle both for the duration of copyright and for informational uses to be exempted from liability consistently with users' common sense. In addition, a pair of principles will apply to the vesting of rights in creators and to any subsequent chain of title in their creations. Finally, we shall broach overriding principles that may bear on our entire analysis.

A. The Core Creator's Right

Creators have rights: "copyrights," we say in English; "authors' rights" is the term used elsewhere. These rights are justified by rationales that diverge in theory, but that may be variously reconciled in practice.[65] To start, we shall ask: how may diverse creators exercise their rights without finding themselves pitted against each other? We shall formulate a core creator's right with an eye to enhancing culture, while trying to defuse tensions between the very creators of culture.

1. We each have the core right to disseminate our own creations.

A half-millennium ago, printing presses started making copies faster and cheaper. At the start of the eighteenth century, the first copyright statute granted authors rights to control such reproduction. Over the following centuries, lawmakers recognized other creators' rights, starting most notably with the right of public performance and ultimately reaching

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[64] We here argue that, if correctly principled, case-specific relief not only suffices for resolving, but best resolves, most copyright issues brought before the courts. Furthermore, legislation that leaves lay people little choice but to engage counsel at almost every turn in disseminating information does them, and society, no good. For a different challenge to copyright legislation, see DAVID LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT pt. 5 (forthcoming) (draft on file with author).

[65] *See supra* text accompanying notes 18–30 & 51–64 *passim*.

the right of communication to members of the public.[66] With media progress, culminating in the Internet, modes of disseminating creations have tended to converge. In our first principle, we therefore propose a core right of dissemination to subsume all of creators' other rights. This core right would entitle creators to control how their creations reach members of the public.

2. One creator's right may not be exercised to restrain the making or dissemination of others' creations.

Consider Hiroshige's prints and Van Gogh's studies of these prints.[67] Hiroshige's prints, made with woodblocks, were copied when Van Gogh reworked them into studies painted in oils. Should Hiroshige have been entitled to have Van Gogh stopped from making these copies of his prints, however creatively? Bear in mind that, under our first principle, creators may control only acts that have to do with the eventual dissemination of their own creations.[68] Thus, under our second principle, Hiroshige would have had no basis on which to have Van Gogh stopped from merely making private studies of his prints. The core creator's right just does not preclude copying in itself but applies only to copying from which dissemination might ensue.

What may Van Gogh do with his studies outside his studio? For example, without Hiroshige's consent, may Van Gogh or his heirs publicly display his studies or publish copies of them? More basically, we need to ask: how may diverse creators assert their core rights to disseminate their "own" creations? Start with routine copies, notably those made by applying set techniques or rules to creations to generate identical or close copies. Suppose, for example, that making prints with Hiroshige's woodblocks takes technical skill, but not creativity: the resulting copies are routine.[69] Hiroshige may invoke his core right to stop the printer from disseminating such mechanically produced copies, which represent only Hiroshige's "own" creations. But we can tell Hiroshige's prints and Van Gogh's studies apart at a glance: while copying the earlier artist's creation, the later artist has woven in substance that could not have been routinely generated. From one's prints to the other's studies, composition goes from static to dynamic, coloration from muted to emphatic, and emotional tone

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66 *See supra* text accompanying notes 4–11 & 54–55.

67 For side-by-side reproductions of these works, see Hiroshige.org.uk, Ando Hiroshige [&] Van Gogh, http://www.hiroshige.org.uk/hiroshige/influences/VanGogh.htm (last visited Dec. 7, 2007).

68 *See supra* text accompanying note 66.

69 *See*, *e.g.*, Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 195-99 (S.D.N.Y. 1999) (finding no creativity in "exact photographic copies" of art works).

changes altogether. Under our second principle, Hiroshige may not stop Van Gogh from disseminating the later studies, which represent Van Gogh's "own" creations.[70] Creators should rather be left free to contribute to our culture as they rework it.

In the nineteenth century, copyright law came to include a new right.[71] This right entitled earlier creators to control later creations, such as translations, transformations, or adaptations, derived from their prior creations. In setting out our fourth and fifth principles below, we shall explain how our first pair of principles may guide courts in fashioning remedies for such creators' rights.[72] For example, earlier creators may share in the profits earned in exploiting any derivative creation to the extent of their contributions to the market success of this later creation. For now, as a matter of principle, we give the benefit of any doubt to later creators. They may not be stopped from giving the public the benefit of their creations.

3. Creators may not exercise their rights to stop the use of techniques that are incorporated into creations or to require payment for such use.

Compare Alvar and Aino Aalto's chairs[73] with Charles and Ray Eames' furniture.[74] The Aaltos were pioneers in designing chairs made of laminated wood molded into simple curves. The Eames later developed their own designs as they perfected techniques for molding furniture into compound curves. May the Eames invoke their creators' rights in their designs to stop others from using techniques incorporated into their creations or to make others pay for such use? While the letter of the law sometimes equivocates on point, the better copyright jurisprudence has long answered in the negative. In a key case in the United States, a claimant asserted copyright in forms that represented new accounting techniques. The U.S. Supreme Court would not recognize copyright in the

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[70] For further analysis, see Paul Edward Geller, *Hiroshige v. Van Gogh: Resolving the Dilemma of Copyright Scope in Remedying Infringement*, 46 J. COPR. SOC'Y 39 (1998), *reprinted in* DEAR IMAGES: ART, COPYRIGHT AND CULTURE 421 (Daniel McLean & Karsten Schubert eds., 2002).

[71] *See supra* text accompanying note 10.

[72] *See infra* text accompanying notes 84–107 *passim*.

[73] For a photograph of one of their chairs, see Thinkquest.org, Alvar Aalto, http://library.thinkquest.org/C005594/Architects/aalto.htm (last visited Dec. 7, 2007).

[74] For photographs of their furniture and an explanation of their techniques, see Library of Congress, The Work of Charles & Ray Eames, Aug. 20, 2004, http://www.loc.gov/exhibits/eames/furniture.html.

forms, reasoning that patent law should govern their use.[75] Our third principle does not change this law, but rather crystallizes it.

Assume that the Aaltos' techniques for molding laminated wood into simple curves have become common knowledge. Starting with that know-how, a competitor could take the Eames' chairs as templates for molding their own chairs into compound curves to seat the human body. Suppose that the competitor made variations in the Eames' designs, for example, to accommodate different manufacturing methods and to enhance structural solidity. What result if the Eames could have copyright enforced in their designs, stopping the competitor from making and selling comparably formed chairs?[76] The Eames could thus try to monopolize their techniques for molding diverse materials into furniture in the light of ergonomics. Any such monopoly, under copyright law, would last longer than it would under design law that protects forms embodying techniques or under patent law that protects techniques as such. Furthermore, copyright law would not impose stringent conditions of priority as would such industrial property laws. Multifarious provisions of law already avoid substituting copyright for industrial property to protect techniques.[77] Our third principle recapitulates their tenor by precluding creators' rights from protecting techniques.

All culture may be said to ride on the tracks of techniques. Think, for example, of the writer's story lines and of the painter's color formulae. A court has to separate out cultural creation from the routine use of techniques, not only in design cases, but potentially in all copyright cases. On the one hand, armed with creators' rights, Gerard Manley Hopkins could

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[75] Baker v. Selden, 101 U.S. 99 (1879). The Supreme Court refused to apply copyright to accounting forms which followed "a similar plan" of "ruled lines and headings" as found in claimant's forms. Reasoning that the overall effect of providing remedies for such copying would have been to preclude use, it declared that the matter fell into "the province of letters-patent, not of copyright." *Id.* at 100-02. For further analysis, see Pamela Samuelson, *The Story of* Baker v. Selden*: Sharpening the Distinction Between Authorship and Invention*, *in* INTELLECTUAL PROPERTY STORIES 159 (Jane C. Ginsburg & Rochelle C. Dreyfuss eds., 2005).

[76] *See*, *e.g.*, the *Lounge Chair* decision, OLG (Intermediate Court) Frankfurt a.M. (F.R.G.), Mar. 19, 1981, 1981 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 739, *translated in* 13 INT'L REV. INDUS. PROP. & COPYRIGHT L. 777 (1982) (protecting an Eames chair with copyright, while invoking the fact that the New York Museum of Modern Art had it on display).

[77] For examples, see national chapters § 2[4][c], *in* INTERNATIONAL COPYRIGHT LAW & PRACTICE, *supra* note 29. For further analysis, see Jerome H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2448-504 *passim* (1994).

stop others from republishing his poems,[78] just as Georges Seurat could stop others from selling routine copies of his painting *La Grande Jatte*.[79] On the other hand, Hopkins could not stop others from writing with the sprung rhythm which he developed out of common speech, nor could Seurat stop others from painting with the pointillist technique which he distilled out of impressionism. Of course, just as dramatists can write myriad tragedies following Aristotle's rule of having a great person act with hubris and fall, all authors can write myriad texts using techniques such as the phrasing and rhythms that they find in common speech, and artists can make myriad images using techniques such as perspective and impressionist coloration. There are often fewer options in borderline cases: maps can feature only a limited range of lines, colors, and icons to chart locales; directories can sequence names and contact information into only so many orders to be accurately and easily consulted.[80] In copyright law, diverse doctrines have been elaborated to avoid locking up techniques, whether for generating literature and high art or products such as maps, telephone directories, or chairs. Our third principle amplifies on these doctrines, directing courts to protect only texts, images, and other such materials insofar as the routine use of techniques does not suffice for generating these materials.

This principle does not imply our acceptance of the present regime of industrial property. Of course, we need some legal regime to protect innovative techniques in appropriate fields and at appropriate levels. But that regime, currently patent, design, and related laws, lies outside the scope of the present analysis.[81]

B. Specific Rights and Remedies

Courts enforce rights with remedies. They order parties to stop doing certain acts or to do others, notably to pay monetary awards. Under the rubrics of moral and economic rights, we shall outline remedies for creators' rights. Our purpose is to focus relief more coherently and cost-effectively on realizing the aims of these rights. To this end, how to take account of our first principle, which defines the core creator's right in

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[78] For texts, see Poet's Corner, Gerald Manley Hopkins, http://www.theotherpages.org/poems/hopkins1.html (last visited Dec. 7, 2007).

[79] For a reproduction, see The Art Institute of Chicago, A Sunday on La Grande Jatte, http://www.artic.edu/artaccess/AA_Impressionist/pages/IMP_7_lg.shtml (last visited Dec. 7, 2007).

[80] For further analysis, see Paul Edward Geller, *US Supreme Court Decides the* Feist *Case*, 22 INT'L REV. INDUS. PROP. & COPYRIGHT L. 802 (1991).

[81] For a proposal to reform this regime, see Paul Edward Geller, *An International Patent Utopia?*, 25 EUR. INTELL. PROP. REV. 515 (2003).

terms of dissemination to members of the public?[82] As the risks of harm or chances of profits increase, dissemination presumptively reaches more members of the public, and civil remedies may be adjusted accordingly. Our ninth principle will require lawmakers to define the term "public" more precisely when penal sanctions are called for.[83]

4. We have moral rights to have ourselves referenced as creators, to have our creations referenced when reworked versions are disseminated, to be paid damages for failure to so reference, and to obtain relief for impaired dissemination or embodiments.

The film *The Asphalt Jungle* was shot in grim and shadowy blacks and grays befitting its dark story of a failed attempt at robbery.[84] The children of the director John Huston, along with the screenwriter Ben Maddow, sued to stop the televising of the colorized version of this *film noir* in France. The French Supreme Court held that Huston and Maddow, as creators of the film, had moral rights to prevent it from reaching the public in this form that they did not intend.[85] This decision recognized a strong moral right to integrity that allows earlier creators to have their intentions imposed on later creators making new versions. Colorizing the film entailed some creativity, so that our second principle, precluding orders to stop the dissemination of others' creations, could arguably apply to such a case.[86] Subject to that principle, our fourth principle specifies distinct remedies that creators may obtain to protect their moral interests.

Our fourth principle provides for three remedies with regard to referencing creators and their creations. First, asserting their right to attribution of authorship, creators may obtain orders to have their names of choice and their roles referenced, or not referenced, when their creations are disseminated. For example, the screenwriter of *The Asphalt Jungle* may have his name left on or taken off the colorized version as it was televised, or another name used, and his role in the creative team noted or not. But our fourth principle does not allow for vindicating the strong

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[82] *See supra* text accompanying note 66.

[83] *See infra* text accompanying notes 133–135.

[84] For stills and brief information, see Dark City: Film Noir and Fiction, The Asphalt Jungle, http://www.eskimo.com/~noir/ftitles/asphalt/index.shtml (last visited Dec. 7, 2007).

[85] Huston c. Société Turner, Cass. civ. I, May 28, 1991, 149 R.I.D.A. 197 (1991). Upon suing, the Hustons and Maddow had obtained an order to stop the televising of the colorized version of the film. The Paris Court of Appeal ultimately reversed the ruling on which this order was based, and the colorized version was then released to the public. After the Supreme Court overturned that reversal, the court on remand awarded damages for the *fait accompli* of this release.

[86] *See supra* text accompanying notes 67–70.

right to integrity that, under some laws, would entitle creators to obtain orders to stop the dissemination of creative reworkings prejudicial to their reputations or contrary to their intentions.[87] Imagine, quite hypothetically, Beaumarchais suing to stop the staging of the opera *The Marriage of Figaro* based on his play: he might argue that Mozart's music, like colors prettifying a *film noir*, might distract us from his text, which Da Ponte had truncated in his libretto to evade censorship.[88] Rather than help earlier creators thus to censor later creators, courts may grant the second remedy contemplated here: have a creation, as the creator had it disseminated, referenced when a creatively reworked version is disseminated, so that the public can benefit from both creations.[89] But what are creators to do about plagiarism, when their creations are redisseminated, even in versions that are partially reworked, but without any notice of their name and role to the public? Our fourth principle sets out a third remedy: creators may obtain damages, notably but not exclusively to reputation, for failures to reference themselves or their creations.[90]

In our fourth principle, we also contemplate remedies for impairments to integrity in cases where no creative reworking is present.[91] What if a creation merely suffers impaired dissemination, for example, in routine copies of poor quality or in misleading or other derogatory contexts? In

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87 *Compare* Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis* (Paris Act, adopted July 24, 1971, and amended on September 28, 1979), *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726 (setting out criteria of "derogatory action . . . which would be prejudicial to [the author's] honor or reputation"), *with* HENRI DESBOIS, ANDRÉ FRANÇON & ANDRÉ KÉRÉVER, LES CONVENTIONS INTERNATIONALES DU DROIT D'AUTEUR ET DES DROITS VOISINS 40-41 (1976) (contrasting this language with purist criteria of "integrity"), *and* BERNARD EDELMAN, LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 35-53 *passim* (3d ed. 1999) (explaining this purist approach in French law).

88 For background, see Wolfgang Stähr, *When the Masks Are Off* – The Marriage of Figaro*: Mozart Follows Beaumarchais*, FRIENDS' MAG. FOR FRIENDS AND PATRONS OF THE SALZBURG FESTIVAL, *available at* http://www.festspielfreunde.com/english/frames/200012/ef_200012_08.htm (last visited Dec. 7, 2007).

89 For the original formulation of this proposal, see Paul Edward Geller, *The Universal Electronic Archive: Issues in International Copyright*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT L. 54, 65-66 (1994); Geller, *Overriding Norm in Copyright*, *supra* note 24, at 74-83.

90 *See*, *e.g.*, NEIL BOWERS, WORDS FOR THE TAKING: THE HUNT FOR A PLAGIARIST (new ed. 2007) (recounting harm, well beyond mere loss of reputation, resulting from plagiarism).

91 For another analysis, see Leslie Kim Treiger-Bar-Am, *Adaptations with Integrity*, *in* COPYRIGHT AND OTHER FAIRY TALES: HANS CHRISTIAN ANDERSEN AND THE COMMODIFICATION OF CREATIVITY 61 (Helle Porsdam ed., 2006).

such cases, the claimant encounters neither a later creator's right to disseminate a reworked version nor the public's interest in enjoying this new version. A court may then require the impaired dissemination to be corrected or at least ameliorated, as the circumstances equitably allow, and award damages for residual harm.[92] Relief becomes harder to fashion in cases of only one or very few embodiments of a creation, for example, of a single art object or short print run, that might be modified or destroyed. Creators' rights can then get entangled with other rights, most notably the rights of tangible property of whoever owns the art object at issue. Our fourth principle calls upon courts to exercise discretion in undertaking the Solomonic task of reconciling resulting claims. In a key French case, the artist Whistler refused to deliver a portrait upon the demand of Lord Eden, who had paid to have it made of his wife. The courts allowed Whistler to retain the portrait, subject to equitable conditions to protect both the commissioning party and the model.[93] Turn to a more recent case: Richard Serra's *Tilted Arc* was created for a public space, but people frequenting the space wanted it removed.[94] Our fourth principle stresses creators' interests in keeping their creations intact, though equitable solutions may turn on the public interest. Consider the Athenian Parthenon and Buddhist art along the Silk Road:[95] over time, sculptures have been damaged, and painting has faded. Thus, in some cases, a court may have to consider the public interest in avoiding cultural amnesia.[96]

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92 *See*, *e.g.*, Germi c. Rizzoli e Reteitalia (the *Serafino* case), Tribunale, Rome (Italy), May 30, 1984, 56 IL DIRITTO DI AUTORE 68 (1985) (directing broadcasters to keep from interrupting televised films with spot commercials too often, at crucial points in plots, etc.), *rev'd*, Corte di Appello, Rome, Oct. 16, 1989, 61 IL DIRITTO DI AUTORE 98 (1990) (purist approach).

93 William Eden c. Whistler, Cass. civ., Mar. 14, 1900, D.P. 1900, 1, 497. The artist had to pay damages for non-delivery, to make restitution of all payments received, and to make the model unrecognizable for purposes of future displays.

94 For photographs and background, see Culture Shock, Richard Serra's Tilted Arc, http://www.pbs.org/wgbh/cultureshock/flashpoints/visualarts/tiltedarc_a.html (last visited Dec. 7, 2007).

95 For reproductions, respectively, see *Scientists Retrace Parthenon's Brilliant Hues*, MSNBC, Mar. 21, 2006, http://www.msnbc.msn.com/id/11945940; China the Beautiful, Dun Huang Grottoes: West Wall of Cave 285, http://www.chinapage.com/images/C285w-F.jpg (last visited Dec. 7, 2007).

96 *See* ADOLF DIETZ, DAS DROIT MORAL DES URHEBERS IM NEUEN FRANZÖSISCHEN UND DEUTSCHEN URHEBERRECHT: EINE RECHTSVERGLEICHENDE UNTERSUCHUNG 188-93 (1968).

5. We have economic rights to have the unauthorized dissemination of routine copies stopped, if it threatens irremediable harm, and to be paid damages or profits arising from any unauthorized dissemination of our creations, even in reworked forms.

Unless acted upon quickly, creators' rights can lack teeth. Imagine a case of routine copies about to be made public without consent. Close but defective copies might bias the market against the creator. Close but good copies might usurp a market that the creation addresses. Either way there is a risk of irremediable harm that would call for stopping dissemination. Such routine copies merely imitate originals that the creator may disseminate, so that stopping them in their tracks need not deprive the public of access. However, orders stopping the dissemination of creative reworkings of prior creations might well impair cultural wealth by blocking access to new creations.[97] Under our fifth principle, creators may accordingly obtain distinct remedies for their economic rights. They may have the unauthorized dissemination only of routine copies stopped if it threatens them with irremediable harm. Or they may be awarded money for such dissemination of their creations, even in reworked forms.[98]

Authors spend time and energy writing texts, as do artists making images. But, unlike private goods like land, such creations tend to be public goods, hard to fence and easily shared.[99] For example, with the advent of print, creators gave media entrepreneurs manuscripts and pictures to publish. But a competitor could reset type or plates and usurp markets with cheap reprints, harming creators and entrepreneurs. Today, often without authorization, creations easily move from private circles into the Internet, where risks of harm can proliferate globally. A court may well hesitate injunctively to intrude on small circles of communication, especially where damages are likely to be minimal.[100] By contrast, a court may issue an order on short notice to protect a right if it is confronted with an imminent violation that threatens irremediable harm. But our fifth princi-

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97 For other analyses, see Rubenfeld, *supra* note 25, at 48-59; Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 144-46 (2006).

98 *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994) (opining that "the goals of the copyright law, 'to stimulate the creation and publication of edifying matter,' [citation omitted], are not always best served by automatically granting injunctive relief" but that courts may well limit themselves to "an award . . . for whatever infringement is found"). *Cf.* eBay, Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1840 (2006) (confirming this approach).

99 For the notion of public goods, see *supra* text accompanying note 2.

100 *Cf.* BMG Canada, Inc. v. John Doe, (2005) 39 C.P.R.4th 97 (Fed. C.A.) (Can.) (declining to order the identification of file-sharers without sufficient evidence of widespread infringement).

ple, allowing such relief, is subject to our second principle, which allows stopping the dissemination only of routine copies, not of creative reworkings.[101] To sort out such enjoinable copies from creative reworkings, a court may ask: could the production alleged to be infringing have been fully generated from claimant's creation merely by using techniques? A machine translation could accordingly be found to be a routine copy, and therefore enjoined if not authorized, but an inspired translation of an innovative text, say, one of Mallarmé's poems, could not be so treated.[102] An injunction might also lie against an anthology of conventionally abridged and arranged texts or images that were otherwise left as is. A further rule of thumb may apply in such borderline cases, where derivative productions do not display striking creativity. Courts may then ask: would dissemination of the production usurp a market that claimant's creation on its face addresses? For example, could the abridgement substitute for enjoying claimant's text or image? If so, an injunction may be in order.[103]

For dissemination already achieved without authorization, the claimant may recover money. Our fifth principle sets out the classic remedy: an order to pay damages, notably for the loss of any market that a creation addresses. Even in cases where there is no such harm, it seems only fair to restitute to earlier creators some measure of the market value of whatever later creators take from their prior creations.[104] For example, Dashiell Hammett, in his novel *The Maltese Falcon*, created tight dialogue, colorful characters, and a suspenseful plot, which John Huston chose to adapt to film. But Hammett's novel took on new life in Huston's motion picture, thanks to creativity in casting and directing actors, in visually articulating action, and in otherwise putting the story on screen.[105] Of course, before investing in production and to optimize profits downstream, a prudent media entrepreneur would negotiate a contractual arrangement to exploit any creation derived from another. Nonetheless, suppose, hypothetically,

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101 *See supra* text accompanying notes 67–70.

102 For analysis and examples, see C. John Holcombe, Translating Mallarmé, http://textetc.com/workshop/wt-mallarme-1.html (last visited Dec. 7, 2007).

103 For further analysis, of both injunctive and monetary remedies, see Geller, *Dilemma of Copyright Scope*, *supra* note 70, at 59-70.

104 *Compare* Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. Legal Stud. 449 (1992), *reprinted in* 34 McGeorge L. Rev. 541 (2003) (arguing for the restitution of benefits taken from one creator, even by another, to minimize externalities), *with* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031 (2005) (arguing it to be unworkable to try to eliminate all such externalities).

105 For stills and brief information, see Dark City: Film Noir and Fiction, The Maltese Falcon, http://www.eskimo.com/~noir/ftitles/maltese/index.shtml (last visited Dec. 7, 2007).

that Huston's studio had not obtained film rights to Hammett's book: it could later face the novelist's suit to have its earnings provisionally sequestered pending trial and to find it ultimately liable to pay the novelist a fair share of profits.[106] In such a suit, a court would have to disentangle Hammett's contributions to the profits earned by the film, on the one hand, from such contributions to film profits made by Huston and the rest of the creative team of the film, on the other. The prospect of losing some judicially approximated share of profits should prompt creators, and entrepreneurs supporting them, to obtain authorization to exploit derivative creations.[107]

We have just outlined remedies that creators may obtain from courts in civil actions.[108] Injunctive remedies have been limited so that creators contributing only partially to new creations may no longer hold these up by having them enjoined. Rather they may seek damages or profits, and the very prospect of their suits should encourage the growth of contractual arrangements to market creations, whether in original or derived versions. However, media progress has given rise to the so-called darknet, for example, file-sharing networks, into which it can be hard to extend judicial remedies.[109] Technological schemes are contemplated to monitor the flow of creations within the darknet for purposes of remuneration.[110] Self-help measures are also being essayed, and our ninth and tenth principles will bear on such measures.[111]

6. Creators' rights are limited in time, and economic rights may not apply to redisseminations that common sense finds necessary to achieve such informational purposes as criticism, providing examples or news, or study.

How far does our core right of dissemination extend? The law puts a variety of borderline cases into the public domain, where uses become per-

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106 Hammett's authorization had been contractually obtained. *See* Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955). Note that our second principle moots the issue of whether to enjoin any sequel in this case, and our seventh principle would compel restrictive construction of any contractual transfer.

107 *Cf.* Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121 (1999) (analyzing how liability rules can lead to bargaining).

108 *See supra* text accompanying notes 82–107 *passim*.

109 For the notion of the darknet, see *supra* text accompanying note 40.

110 *See*, *e.g.*, Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003) (outlining such a scheme in some detail).

111 *See infra* text accompanying notes 131–42 *passim*.

missible.[112] To start, over time, creators' ties to any public are deemed so attenuated that all uses of their creations are left free. Indeed, copyright statutes usually set the duration of economic rights at fifty or seventy years after a creator's death. Under our sixth principle, courts may also take the passage of time into account in fashioning remedies. They may decline to protect creators' personal interests that, while once motivating moral rights, have waned with time. For example, the French Supreme Court reversed a decision which invoked Victor Hugo's moral right to stop a sequel of his nineteenth-century classic *Les Misérables.*[113] A court may also, in assessing monetary awards for economic rights, discount or ignore future or speculative damages.[114]

Our sixth principle also allows a large range of informational uses. These often take place on the borders of the marketplace.[115] They include critical uses, illustrative and reporting uses, and educational and research uses. Consider this case: the *Air Pirates Funnies* parodied Walt Disney's characters, most notably depicting Mickey and Minnie Mouse and their friends as indulging in sex and drugs.[116] The parodists would have found it futile to seek consent for their publications from Disney, who sued them, ultimately with success.[117] A critic might similarly hesitate to ask for consent to quote large passages of a recent book to show how badly it was

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112 For further analysis, see Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006).

113 Plon S.A. c. Pierre Hugo, Cass. civ. I, Jan. 30, 2007, 212 R.I.D.A. 248 (2007). The Paris Court of Appeal had ruled that moral rights were violated by any sequel to this finalized "monument of world literature." The Supreme Court reversed this holding and remanded the case to a trial court for inquiry into actual confusion regarding authorship or actual distortion of the work. The Supreme Court invoked "freedom of creation" as an overriding consideration in the case.

114 *See* Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003). *See*, *e.g.*, EDELMAN, DROITS D'AUTEUR DROITS VOISINS, *supra* note 54, at 66-71 (explaining how French copyright law authorizes judges equitably to prevent an author's post mortem representatives from withholding works from the marketplace either by abusing the moral right of divulgation or by abusing economic rights of exploitation in already disclosed works).

115 For further analysis, see Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

116 For images from the comics and a short history of the case, see Harlequin Comics Page, Disney vs. the Air Pirates, http://home.freeuk.net/moondog/air.htm (last visited Dec. 7, 2007).

117 Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). The U.S. Circuit Court rejected appeals to freedom of expression, while it gave the parodist artistic directives: "very little would have been necessary to place Mickey Mouse and his image in the minds of the readers." *Id.* at 757-58.

written. A scholar might find it costly to obtain consent to illustrate a book on art history with hundreds of photographs of paintings. A reporter might not have time to obtain consent to include a tune played, or a painting hung, in the background of a current event. It might not be feasible to seek advance consent to give excerpts to a class or research group as teaching or inquiry proceeds. Copyright laws tend to make exceptions for most of these uses, but they do so neither clearly nor simply.[118]

How to guide our users in such cases? Treaty terms would compel lawmakers to ask, most notably: how would exempting this or that use of copyright materials impact exploitation?[119] But consider the users: critics and scholars, reporters, teachers and researchers, or others who want to make a point, to report on current events, or just to teach or learn something. Unfortunately, such users are not often in any position to calculate, on the spot, what impact the redissemination which each contemplates would have on the marketplace if the use were generalized. Nonetheless, copyright law tends to allow their redisseminations for a pair of reasons: such uses accelerate information flows feeding creativity, and they do not usually substitute for creative materials on the marketplace. Our principle, above and beyond treaty terms on point, imposes an additional requirement on lawmakers: exceptions benefiting users should be user-friendly. Users need criteria that tell them what uses they can make in the light of their purposes and circumstances, which they know first-hand and understand in terms of common sense. Our sixth principle accordingly leads to a three-step test, with each response subject to common sense: am I engaging in an informational use such as criticism, providing examples or news, or study? am I taking only such protected materials as the use requires and addressing only the audience the use concerns? am I, under our fourth principle, adequately referencing creators and sources?[120]

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118 For illustrations from U.S. law, see KEITH AOKI, JAMES BOYLE, & JENNIFER JENKINS, TALES FROM THE PUBLIC DOMAIN: BOUND BY LAW? (2006), *available at* http://www.law.duke.edu/cspd/comics. A rich case law in the United States interprets the doctrine of "fair use" which limits copyright. Lawyers versed in this case law might assess how this doctrine may allow certain uses in hard cases. For examples, see Nimmer, *supra* note 32. In addition, other copyright laws tend to codify exceptions in complex and cumbersome statutory provisions. For examples, see national chapters § 8[2], *in* INTERNATIONAL COPYRIGHT LAW & PRACTICE, *supra* note 29. Rather than falling under one doctrine, hard cases then collect in the nooks and crannies of these provisions, themselves hard to grasp together.

119 *See* TRIPs Agreement, art. 13, *quoted supra* text accompanying note 59.

120 *See supra* text accompanying notes 86–90. Since exceptions apply only to economic rights, in principle they leave intact moral rights, notably, to reference. Nonetheless, common sense would still govern the adequacy of references in the context of exempted uses.

Return to our examples. Our second principle would have insulated the *Air Pirates Funnies* from any order to stop publishing, but not from a suit for damages or profits.[121] Our sixth principle leads users, if they are to escape liability altogether, to assess how much of others' creations to redisseminate and how tightly to restrict their audience, given their purposes and circumstances. For example, a parodist can give an entire text, tune and lyrics, or series of images such a new slant and form that little, if any, of the materials taken are redisseminated to the public at large in their original guise. Critics, scholars, and others illustratively redisseminating creations to the public can keep their quotes to the point, or sampled images sized as instances, while reporters can include entire creations, but only fleetingly, in news releases to the public. By contrast, librarians, teachers, or researchers might share larger excerpts, even entire creations, with groups of students or fellow researchers, while proportionately limiting the size of these groups.[122] Once a user shows a redissemination to serve an informational purpose, the court may ask how far this use goes beyond common sense in meeting its purpose. Only to the extent that the use is shown to have defied common sense would it risk leading to actionable damages or profits.

C. Whose Rights; Standing

Who initially holds creators' rights? The easy answer: creators have rights in their creations once these can be disseminated. There are, however, hard cases, notably of team creations and those made on the job or on order. In such cases, it might not be feasible to disentangle creators' respective contributions, and employers might have invested in work-products as well. Creators may also have to transfer rights to exploit their creations. Let us consider who may exercise rights in all such cases.

7. Creators hold rights in their disseminatable creations and may allocate economic rights among themselves through equitably construed consensus or transfer such rights to others in restrictively construed contracts.

Imagine members of a jazz group improvising in a live jam session. Suppose that another person, without their consent, tried to pick up their session with a hidden microphone and to transmit it to the public at large. Our seventh principle follows the majority of laws worldwide in vesting

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121 *See supra* text accompanying notes 67–70.

122 *See*, *e.g.*, Queneau c. Boue, TGI (First-Instance Court) Paris (Fr.), June 10, 1997, J.C.P. 1997, II, 22974, *translated in* 2000 EUR. COPYRIGHT DESIGN REP. 343 (not holding liable a research team at the French National Center for Scientific Research for making protected poetry available to its members on an intranet walled off from the Internet).

rights in creators the moment that their creations can be conveyed to others. In our example, the musicians may, from the moment of live improvisation, exercise creators' rights over the dissemination of whatever creation others might enjoy in their performance.[123] Suppose that the group created most of its music playing as a team but that, outside group-generated materials, single members created the rest of the music, improvising distinct stretches quite alone. Our seventh principle has rights vest in the group for music it improvises together and in individual members for their solo riffs, absent any consensus to exercise rights together.

As the number of creators increases, their contributions to a given creation can become harder to disentangle. Some laws fictively make the employer or director of a team of creators, or even of a solitary creator, the "author" of any resulting creation.[124] Under our seventh principle, by contrast, rights in a creation vest only in its creators, whose consensus allocates rights among themselves and whose contracts dispose of rights to others. If an employer or some other person or entity, not participating in creation, paid agents to create, this person or entity would have prudently negotiated contractual terms to acquire rights in any resulting work-product. Given the potentially diverse and often-unpredictable future uses of creations, all contractual terms allocating rights to parties other than fellow creators are to be restrictively construed. Consider this somewhat different case: a videogame or software created worldwide on the Internet by many creators over time.[125] Assume no employer or other director of this ad hoc team, nor any explicit agreement between its members allocating their rights. Our seventh principle directs courts to give equitable effect to this team's implicit consensus. Contracts standard in network circles could serve as evidence of consensus. Only specific contractual waivers could renounce rights toward third parties.[126]

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123 Under most laws, our hypothetical musicians could assert performers' neighboring rights. *See supra* text accompanying note 11. The principles proposed here would moot the need for such rights by justifying relief for the redissemination of routine copies of performances that displayed the least creativity, for example, in interpretation, styling, etc. But these principles would not justify enjoining performances by other artists who vary interpretations, styles, etc., with minimal creativity. *See supra* text accompanying notes 67–70. Moral rights, with appropriately hedged remedies, could also apply, as could monetary awards and informational exceptions. *See supra* text accompanying notes 86–92, 104–07 & 115–122.

124 For examples, see national chapters § 4[1][b], *in* INTERNATIONAL COPYRIGHT LAW & PRACTICE, *supra* note 29.

125 For further analysis, see Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004).

126 For example, copyright claims have rarely been brought for the remarketing of fashion designs, but they might be raised if market conditions changed. For analysis, with visual instances, see Kal Raustiala & Christopher Sprigman,

8. Claimants may obtain monetary relief if they show entitlement, but users may defend against claims for profits to the extent of their good-faith attempts to obtain authorization to redisseminate creations.

Our media universe grows ever vaster, and creators may engage others to take their creations into its far corners. To this end, creators may transfer their economic rights all at once or piece-meal, license specified uses more or less exclusively, or waive rights. Given that the commerce in rights grows more and more far-flung and complex, what must a claimant show to obtain remedies for creators' rights? In fashioning preliminary orders, courts may take account of showings of many factors, including infringement, threatened harm, and the entitlements or representative capacities of claimants. For any final monetary award, our fifth principle calls for showings of infringement and of damages or profits.[127] Under our eighth principle, to pocket awards, claimants also have to show one of a pair of sources of entitlements. Either they are the creators, or they acquired the rights through good chain of title from the creators.

How public is such chain of title? The answer tells us how easy or hard it is to find parties entitled to authorize uses. Contract and commercial law may prompt transferees to give the world notice of their claims. With such notice, transferees increase the chances of trumping subsequent transactions that purport to transfer the same rights.[128] Nonetheless, many creations, though already disseminated, have been orphaned: it is no longer feasible to find parties entitled to authorize redisseminating them. Creators might be dead and gone, without heirs, and their creations taken off the market, while available data shows no present owners of rights. Imagine, for example, a publisher who had long ago obtained rights from the now-dead creator, but who went out of business after transferring rights to a third party. An open market presupposes that holders of exclusive rights do not arbitrarily refuse to license their rights and thus not

Where IP Isn't; Randal C. Picker, *Of Pirates and Puffy Shirts*; Rochelle Dreyfuss, *Fragile Equilibria*, *all in* VA. L. REV. IN BRIEF, Jan. 22, 2007, http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/01/22/index. For examples of specific waivers toward third parties, that let "others know exactly what they can and can't do with your work," see Creative Commons, License Your Work, http://creativecommons.org/license (last visited Dec. 7, 2007).

127 *See supra* text accompanying notes 90 & 104–07.

128 *See*, *e.g.*, R. Griggs Group, Ltd. v. Evans, [2004] EWCA 1088 (Ch.), *aff'd*, [2005] EWCA 11 (C.A. Civ. Div.) (applying a rule found current in most jurisdictions, that is, the first and noticed agreement has priority over the second one, where an author agreed to transfer copyright worldwide to one party and later transferred it to another, who had notice of the initial agreement).

abuse any dominant market position that these rights enable them to occupy.[129] A claimant would violate this condition by waiting in the wings unknown, effectively refusing to negotiate, and then suing a user who sought to pay for the uses at issue. Recall that, under our fifth principle, one may avoid suits for profits by obtaining authorizations to redisseminate protected materials.[130] Our eighth principle excuses users, after good-faith attempts to obtain authorization, from sharing their profits.

D. Overriding Principles

Copyright law has often been made myopically, without full regard for overriding principles that govern the law as a whole. These higher principles are often implicit in our common sense of basic rights and privileges, for example, privacy and freedom of expression. They also often turn, as lawyers are most apt to sense, on procedures and remedies. How would such principles come to bear on copyright law?

9. Creators' self-help measures may not be enforced beyond the scope of their rights; nor may penal sanctions be imposed for acts not statutorily specified within that scope.

Creators may try technologically to control dissemination and access, for example, with encryption or embedded data. Creators may also call on media services to take-down specific creations, or otherwise to block purportedly infringing materials, that the services are to carry. Court orders to stop the circumvention of technological safeguards or to compel media blocking would have the State impose creators' self-help measures coercively. Under our ninth principle, in deciding whether to grant any such order to protect creators' rights, a court has to comply with the same criteria as our fifth principle dictates for orders to control dissemination.[131] These criteria allow for stopping the unauthorized dissemination only of routine copies, provided that such dissemination threatens irremediable harm, but not for stopping the dissemination of creative reworkings. A court would also have to follow the criteria set out under our sixth and tenth principles, respectively, the former limiting rights in time and in borderline cases and the latter eschewing tensions between copyright law and

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129 *See*, *e.g.*, P.R.T.E. v. Comm'n and I.T.P. v. Comm'n (the *Magill* case), Joined Cases C-241/91 P and C-242/91, E.C. Court of Justice (E.U.), Apr. 6, 1995, 1995 E.C.R. I-743 (compelling television stations to license, on reasonable terms, program listings in which they claimed copyright, after finding that, in refusing to do so, they had abused their market positions).

130 *See supra* text accompanying notes 106–107.

131 *See supra* text accompanying notes 97–103.

other laws.[132] That is, creators' rights may not allow for judicially enforcing self-help measures to bar redisseminations that may not otherwise be enjoined under the law. For example, the Australian High Court refused to stop the circumvention of codes that kept users from changing how they played videogames.[133]

Penal sanctions may include punitive damages in civil cases and fines or imprisonment in criminal cases. A court already exercises the State's coercive powers in civilly ordering a person to stop dissemination, and it does so even more emphatically in civilly or criminally punishing an infringer. Accordingly, without complying with criteria for civilly enjoining infringement, a court may not apply penal sanctions to infringement; nor may it do so unless the State, pursuant to the principle of legality, has the law warn citizens of the specific acts that may lead to penal sanctions. Our fifth principle requires routine copies, a specific enough criterion, as well as a threat of irremediable harm, a vague criterion that can apply differently from case to case.[134] Our ninth principle calls on legislators to fill in this vague civil criterion by specifying the types of dissemination that may trigger penal sanctions for violating creators' rights. For example, the law might stipulate the minimum number of persons to whom the dissemination of routine copies could, in specified cases, trigger criminal liability for infringement. In any event, our ninth principle would mandate courts to construe restrictively provisions that merely supplement criteria of civil infringement with vague requisites of criminal intent.[135] It would also cast doubt on laws that specify criminally infringing acts in rules incomprehensibly complex for most citizens.

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132 *See supra* text accompanying notes 112–122 and *infra* text accompanying notes 136–142.

133 Stevens v. Kabushiki Kaisha Sony Computer Entm't, 2005 HCA 58. This decision illustrated, but did not expressly apply, the principle proposed here. Rather, confined within a problematic statutory scheme, the High Court stressed the need "to avoid an overbroad construction which would extend the copyright monopoly rather than match it." It was especially concerned to avoid this consequence because of the "penal character" of the statutory scheme. *Id.* paras. 45-47.

134 *See supra* text accompanying notes 99–103.

135 *Cf.* Fox c. Aurélien, Cour d'appel (Court of Appeal), 3e ch. cor., Montpellier (Fr.), Mar. 10, 2005, *available at* http://www.juriscom.net/jpt/visu.php?ID=650 (refusing to convict a user of criminal infringement, given evidence that his sharing recordings with a "few buddies" was "private"), *rev'd*, Cass. crim. (Supreme Court), May 30, 2006, 210 R.I.D.A. 326 (2006) (requiring inquiry into possibly infringing sources).

10. In matters of creators' rights, other laws may preclude remedies to avoid undercutting their aims, such as assuring privacy, free expression, or open communication.

A creator has the core right to disseminate throughout media networks, but this right may only be exercised creation-by-creation. It does not justify imposing remedies that would jeopardize aims that other laws may effectuate in governing media networks more generally. On the one hand, constitutions may protect basic rights and privileges, such as privacy and freedom of expression; on the other, regulations may effectuate open communication globally across media networks. Consider the *Alcolix* parody,[136] which closely copied the *Asterix* comic strips: the German Federal Court of Justice, in allowing this parody, invoked a constitutionally guaranteed freedom of art.[137] It took account of that freedom in construing a copyright limitation broadly to avoid constraining creativity and self-expression.[138] Our fourth and fifth principles, in precluding injunctions of creative reworkings, also avoid imposing such constraints.[139]

That said, let us abruptly shift from the level of creation in specific cases to the level of widespread media networks. We have mentioned self-help measures, such as encryption and media blocking, by which creators may try to control how creations are disseminated across networks.[140] But what if such efforts impacted more than the fate of specific creations, skewing how networks systematically function and, in the process, threatening privacy, freedom of expression, or open communication? For example, private initiatives to have online media filter possibly infringing materials ought to stop short of blocking content that could not be enjoined by law.[141] In cases of such systematic impact across networks,

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136 For images from the parody comics, see Asterix-Fan.de, Parodien, http://www.asterix-fan.de/cb/pa/parodie.htm (last visited Dec. 7, 2007).

137 The *Alcolix* decision, BGH, Mar. 11, 1993, 1994 GRUR 206, *translated in* 25 INT'L REV. INTELL. PROP. & COPYRIGHT L. 605 (1994). In this case, protected cartoon characters were parodied, and the German defense of *freie Benutzung* was raised. The Federal Court asked: were the traits of the characters, although closely copied, sufficiently attenuated or faded away, in the context of the parody, for this defense to apply? To assure freedom of art, which the German Constitution expressly protects, the Court adjusted the viewpoint of the observer applying this attenuation criterion.

138 *See also* the *Germania 3* decision, BVerfG (Federal Constitutional Court) (F.R.G.), June 29, 2000, 2001 GRUR 149 (reasoning that the constitutionally-based freedom of art required a broad reading of the exception that would allow a dramatist to quote passages from Brecht's plays extensively in his own plays).

139 *See supra* text accompanying notes 84–107 *passim*.

140 *See supra* text accompanying notes 131–133.

141 For proposed guidelines for such filtering, see the Electronic Frontier Foundation et al., Fair Use Principles for User Generated Video Content, *available*

courts may have to move beyond principles specific to the law of copyright. They may refer to overriding principles stated in constitutions or emerging for new spheres such as cyberspace.[142]

III. CONCLUSION: CHANGES IN VIEW

Mere principles cannot stop media entrepreneurs from trying to monopolize culture on the Internet or computer-savvy users from drawing others' creations into the darknet. Our principles can only serve to guide judges in fashioning relief in hard cases increasingly endemic in copyright law. But we may still ask: where would such jurisprudential developments lead? Here are a few guesses:

Start with the core creator's right. We have tried to articulate remedies for this right that leave creators free to enhance culture. Moral rights need no longer entitle earlier creators to censor later ones for reworking their creations. Rather, creators may have themselves referenced when their creations are disseminated, these referenced when creatively reworked versions are disseminated, and relief equitably fashioned for impaired dissemination.[143] Economic rights need no longer entitle some creators to have the dissemination of others' derivative creations stopped, but creators may have the unauthorized dissemination of routine copies stopped if it threatens irremediable harm. They may also obtain actual damages or equitable shares of profits for the unauthorized dissemination of their creations, even when these are reworked.[144]

Turn to limitations of rights both in their duration and in borderline cases. Legislators have to fix terms of years, after which rights lapse. In addition, in tailoring relief, courts may take account of interests that wane over time.[145] Furthermore, informational uses may be exempted from liability pursuant to broad limitations such as fair use or to specific exceptions. Courts may formulate corresponding criteria of permissible uses in

at, http://www.eff.org/files/UGC_Fair_Use_Best_Practices_0.pdf (last visited Dec. 7, 2007).

142 For constitutional analyses and cites to further sources, see Rubenfeld, *supra* note 25, at 5-36 *passim*, 53-59; LANGE & POWELL, *supra* note 64, pts. 4-5 *passim*; P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, *in* COMMODIFICATION OF INFORMATION, *supra* note 35, at 239. For analysis of emerging network norms, see Lawrence Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815 (2004); Thomas Hoeren, *Tractatus Germanico-Informaticus – Some Fragmentary Ideas on DRM and Information Law*, *in* IT LAW – THE GLOBAL FUTURE: ACHIEVEMENTS, PLANS AND AMBITIONS 149 (A.R. Lodder et al. eds., 2006).

143 *See supra* text accompanying notes 86–96.

144 *See supra* text accompanying notes 97–107.

145 *See supra* text accompanying notes 112–114.

common-sense terms or broaden such criteria in cases where constitutional requirements, such as freedom of expression, so dictate.[146] Eventually, judicially variable doctrines of fair use and legislatively overcomplicated sets of exceptions should give way to criteria of exempted informational uses that users can more easily apply.

Next, ask who owns and may exercise rights. Here legislation occasionally overrides principles to impose fictions of corporate ownership. Nonetheless, where no contractual language clearly justifies alienating creators' rights as soon as these arise, courts may favor vesting such rights in flesh-and-blood creators. Where many creators contribute to the same creation as a whole, their consensus may be equitably construed to allocate their rights among themselves. By contrast, contracts by which creators transfer their rights to others may be restrictively construed.[147] Entitlements to pocket monetary awards should follow provable chain of title from creators. But users who try in good faith to license orphaned creations may defend against claims for profits.[148]

Ultimately, overriding principles come into play. Copyright law may not enforce self-help measures that block permissible uses. Nor may it, given the principle of legality, impose penalties for conduct that statute does not specify within its scope.[149] Nor may it compel relief that, impacting entire networks, might undercut other laws with aims such as privacy, free expression, or open communication.[150]

More generally, we have here tried to conform the law of copyright — or, more justly, the law of creators' rights — to such higher principles.

146 *See supra* text accompanying notes 115–122 & 136–138.
147 *See supra* text accompanying notes 123–126.
148 *See supra* text accompanying notes 127–130.
149 *See supra* text accompanying notes 131–135.
150 *See supra* text accompanying notes 140–142.