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# Finding Copyright's Core Content

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# FINDING COPYRIGHT'S CORE CONTENT

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## I. INTRODUCTION

The beginnings of modern copyright laws can be traced to the fifteenth century, when state authorities, responding to the spread of the printing press, granted printing privileges to printers for two unrelated but inevitable reasons. On one hand, exclusive privileges to print encouraged investment in burgeoning literary and music industries; on the other, they provided a convenient tool for press regulation and censorship by the state.[1] In both cases, a right to print was inherently teleological in that it supported state pursuits of identified goals and was justified by the aims of economic growth or political stability; the law was morally justified. Literature on copyright history further suggests that the notion of authorship, central to modern copyright laws, developed to elevate the status of writers to authors. Authorial status justified claims to proprietary control of literary works as print businesses made works more accessible to a paying public and offered writers an alternate source of income besides patronage.[2] By constructing a highly romanticized notion of the genius author and original authorship, authors and publishers could use copyright laws to justify exclusive protection of markets and income from those markets. Theories of paternity and

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1. *See generally* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993) (examining the concept of authorship from its formation in eighteenth-century Britain to its application to contemporary intellectual property issues); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) (providing analysis of copyright development from a historical, rather than legal lens); JANE A. BERNSTEIN, PRINT CULTURE AND MUSIC IN SIXTEENTH-CENTURY VENICE (2001) (offering a socioeconomic look at the Venetian music press during the mid-sixteenth century, thereby illustrating early issues in ownership of intellectual property).

2. *See* MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 40–44, 50–55 (1994) (tracing the German development of the concept of "author" from professional writer into someone deserving superior property rights over publishers and illegal piracy publishers to use their writing as a way to make a living).

just deserts supported these claims for author's rights.[3] But the protection of the creator of an original work through copyright laws was also largely teleological in that the justification for protecting creators of literary and artistic works was based on the outcome of legal protection and not because it was inherently ethical to protect the rights of individual creators.[4]

Decisions to protect exclusive privileges to print, distribute, and display creative works and grant proprietary control over creative works are moral judgments that are essentially consequentialist. Protecting authors and publishers from unauthorized uses of published works by the public comes with an undeniable social cost—harsh restraint on public freedom to use expressive works, build upon knowledge and increase self-awareness, and develop a unique cultural identity. And sometimes laws that are consequentialist in nature, such as copyright laws, also produce imperceptible inequalities. As a result, many injustices are ignored as lawmakers choose among non-commensurable values. In some respect, a moral benchmark is necessary for these choices to be effectively evaluated and to mitigate injustices and inequalities. This paper proposes that natural law theory and Catholic social teaching provide an effective way to evaluate choices made by the law and to guide decision-making towards the common good.

Despite the unmistakable social costs, copyright laws continue to protect exclusive privileges and proprietary rights of creators and publishers, albeit temporarily, because the ultimate consequence of exclusive protection—the supply of literary and artistic works to the public—justifies any temporary burden these exclusive monopolies may impose on society. Thus, this "tax on readers for the purpose of giving a bounty to writers" is desirable to the extent that it ensures a prolific production of literary and artistic works for the benefit of society.[5]

In this respect, the Copyright Clause in the U.S. Constitution empowering Congress to promote the progress of science through grants of exclusive rights to authors is consequentialist in nature,[6] and so was England's first copyright statute, the Statute of Anne, enacted to encourage learning.[7] International norms governing copyright relations multilaterally on a global level are also inherently consequentialist. The Berne Convention's primary

3. *See* ROSE, *supra* note 1, at 32–41 (discussing the seventeenth-century writer's use of paternity metaphors and reward and punishment analogies to advocate for proprietary ownership in opposition of licensing barriers and piracy by publishers).

4. "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings." H.R. REP. NO. 60-2222, at 7 (1909).

5. Thomas Babington Macaulay, *A Speech Delivered in the House of Commons on the 5th of February, 1841*, *in* FOUNDATIONS OF INTELLECTUAL PROPERTY 309, 311 (Robert P. Merges & Jane C. Ginsburg eds., 2004).

6. U.S. CONST. art. 1, § 8, cl. 8.

7. 8 Ann., 1710, c. 19 (Eng.).

aims were the elimination of piracy of national works distributed abroad, the harmonization of copyright laws to prevent authors from losing incentives for creativity, and the protection of the vested interest of national publishers and printers in exclusive printing rights.[8] This is despite Berne's express language protecting authors' rights.[9]

Finding justification for copyright law in the result or consequences of its legal rules would be sensible since result-based ethics or consequentialism is based on the understanding that the morally right choice in a difficult situation is the choice that produces the most happiness and the least amount of unhappiness for the greatest number of people. This straightforward cost-benefit analysis is simple to use. It would appeal to an individual's rational sense by focusing on the consequences of laws and evaluating the viability or sensibility of those legal rules in light of their social effects. Utilitarianism is a classic manifestation of result-based ethics. The advantage of utilitarianism as an analytical tool for the copyright system is obvious: it allows the morality and viability of copyright laws to be quickly evaluated and justified by measuring their expected utility on collective welfare.[10] Hence, the expected increase in creative production and dissemination of literary and artistic works for public benefit vindicated the grant of exclusive rights to authors and publishers. As the principle of utility provided a plausible account of legislative morality by its protection of human welfare and its evaluation of the consequences of legislative rules on human welfare,[11] utilitarianism emerged and became the ideal analytical tool to study and evaluate the copyright system. The emphasis on utility as a tool for analyzing copyright law has produced numerous economic models aimed at deciphering the optimal level of copyright protection—where the amount of exclusive rights granted would be at an ideal point that does not impinge on public access to creative works.[12]

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8. Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 12–20 (1986). The Berne Convention for the Protection of Literary and Artistic Works of 1886 stated that its basic aim was to be the "constitution of a general Union for the protection of the rights of authors in their literary works and manuscripts." *Id.* at 20. The Convention was, however, introduced to draw large pirate countries into multilateral relations and equalize international protection of creative works. *Id.* at 12–20.

9. Berne Convention for the Protection of Literary and Artistic Works art. 1, *adopted* Sept. 9, 1886, as revised July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3 (entered into force in the United States Mar. 1, 1989). ("The countries to which this Convention applies constitute a Union for the protection of *the rights of authors in their literary and artistic works.*") (emphasis added).

10. Jeremy Bentham, who embraced utilitarianism as a philosophy and vigorously applied its welfare-maximizing analysis to a variety of practical problems, believed that "the business of the legislator . . . is to produce harmony between public and private interests" as each individual's pursuit of what he or she believes will maximize individual interest must be balanced against collective welfare. BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 775 (1945).

11. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 10–12 (1990).

12. *E.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 71–84 (2003) (creating a model of the welfare effect of copyright, ana-

However, the innate problem with using social consequences as a proxy for making value judgments about legal rules is the lack of actual and firm guidance on what the proper content of law ought to be. The derivation of individual rights from a subjective consideration of the collective interest often yields undesirable outcomes because the calculation of benefits and harms allows for the projection of long-range and future social benefits that could be used to justify immediate policy decisions. These immediate policy decisions sometimes carry immense social cost while the projected benefits of future social gains may never even materialize.[13] Despite the intricacies of cost-benefit calculations, the prediction of future consequences from present day actions is still merely a forecast that will not reveal actual results or consequences until long after policy decisions and choices about optimal welfare have been made and implemented.

Forecasting potential consequences from immediate choices through the use of quantitative cost-benefit analyses is easier—qualitative assessments of benefits and risks are more difficult to make because the options that present themselves as choices are often incommensurable.[14] But quantitative analysis often allows specialized interest groups with the most economic power to influence decisions about optimality and what would amount to public welfare by presenting evidence of actual monetary gains

lyzing the extent of broadly defined copyright protection to see how this protection can be a means for promoting efficient allocation of resources); Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 192 (2006) (suggesting a model for "evaluating the welfare implications of changes in the breadth of the rights vested in copyright owners . . . . [T]his model establishes a set of metrics by which to assess specific doctrinal recommendations."); Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007) (using the "Samuelson condition" to advocate for analyzing copyrights under markets for impure public goods rather than pure public goods to reach optimality); Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 37–38 (2004) ("This Article argues that the greater the success of copyright law in generating large numbers of works, the more copyright law should care about access. . . . It does so by focusing on the economics of product differentiation, a venerable area of study in industrial organization . . . ."); Glynn S. Lunney, Jr., *Copyright, Private Copying, and Discrete Public Goods*, 12 TUL. J. TECH. & INTELL. PROP. 1, 4 (2009) (discussing the recording industry's fight against P2P sharing to advocate to treat works of authorship as a discrete public good, rather than a continuous public good, whereby "the self-interest of individual consumers alone can achieve a socially optimal outcome").

13. STUART HAMPSHIRE, MORALITY AND CONFLICT 84–85 (1983) ("Persecutions, massacres and wars have been coolly justified by calculations of the long-range benefit to mankind; and political pragmatists, in the advanced countries, using cost-benefit analyses prepared for them by gifted professors, continue to burn and destroy. The utilitarian habit of mind has brought with it a new abstract cruelty in politics, a dull destructive political righteousness: mechanical, quantitative thinking, leaden loveless minds setting out their moral calculations in leaden abstract prose, and more civilized and superstitious people destroyed because of enlightened calculations that have proved wrong.").

14. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 37–40 (2004) (criticizing the use of cost-benefit analysis for policies aimed at saving lives, preserving natural resources, and protecting life).

and losses from particular policy perspectives.[15] In the copyright system, this group has traditionally been private stakeholders in the leading copyright industries, such as publishers, movie studios, recording companies, and collecting societies, and they are generally present at the negotiating table during the legislative process.[16] The different options that are considered in these policy decisions about copyright law—such as whether to extend the term of copyright to provide more incentives for creativity or allow works to fall into the public domain sooner to allow greater public access—are incommensurable choices because of the incomparability of both options.[17] This makes it difficult, if not impossible, for these options to be ranked numerically and for their comparative moral worth to be effectively assessed by any rational decision-making standard.[18] As both values of encouraging creativity and facilitating access are instrumental towards a given end (i.e. progress and learning), they should not be the ultimate reasons for choice and action because decisions made between both options will be inherently arbitrary and morally unjustified.[19]

As moral analyses of copyright laws have focused predominantly on the social consequences of legal rules, literature criticizing the copyright system has, in the same vein, looked at the results of current policies—a shrinking public domain, inefficient allocation of public and private rights, stifling of free expression—to highlight the inefficiencies and inadequacies of the system.[20] Despite these value judgments about the social effects of

15. *See* NICHOLAS A. ASHFORD & CHARLES C. CALDART, ENVIRONMENTAL LAW, POLICY, AND ECONOMICS: RECLAIMING THE ENVIRONMENTAL AGENDA 165 (2008) (describing how the politicization of the cost-benefit analysis leads to abuse of the political process).

16. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 22–28 (2001) (examining how Congress allowed industries involved with copyright to decide what they want changed in current copyright law and then to present Congress with the new legislation).

17. *See* Matthew Adler, *Law and Incommensurability*, 146 U. PA. L. REV. 1169, 1170 (1998) (explaining that "[t]he incommensurability of options or choices might mean: (1) the incomparability of options or choices, such that no numerical ranking of the options in the order of their comparative worth is possible; (2) the failure of a particular kind of scale, such as a monetary scale or a consequentialist scale, to track the comparative worth of options; and (3) the fact that a scaling procedure (either a particular scaling procedure or any scaling procedure at all) is not the best procedure by which to choose among options.").

18. *Id.* at 1170–71.

19. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 93 (1999).

20. *See, e.g.*, JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 8–11 (2008) (condemning the copyright system for restricting culture to confer a benefit to a minority of works); WILLIAM PATRY, HOW TO FIX COPYRIGHT 6–14 (2011) (advocating for a complete overhaul of the copyright system to reflect the digital abundance in the world and legislation tested for economic efficiency); LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 18–20, 184–92 (2004) (showing how copyright laws fail to respond to the Internet and shrink the public domain of ideas, thereby restricting culture and freedom to create); NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 10–12, 120–21 (2008) (remarking on how copyright should encourage free speech and debate of various ideas, in contrast with the current system burdening expression); MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 15–16 (2012) ("Mine is a complex consequentialist approach that seeks to expand the purpose of this law beyond incentives and efficiency to promoting the broad

copyright law, there is a paucity of literature on what the core content of the law should actually be.[21] Policy decisions regarding the desired social consequences of copyright rules cannot be effectively evaluated on moral grounds when the analysis focuses on the ends and not the means. Instead the focus should be on better understanding the basic values that are desirable for moral legislation and the type of rules that ought to form the core content of copyright laws. This question about copyright law's proper content is a perennial one for many communities and societies with increasing humanistic interests and goals who access and use creative expressions communally, nationally, and globally as a form of public communication to educate, connect with others, and develop solidarity.[22] In an age where policy options as laid out in the legislative process are incommensurable and the deficiencies of the copyright calculus is becoming apparent, the more important question about the proper content of copyright laws must be asked. The rationality that guides policy decisions concerning creativity, expression, and authorship for the common good cannot be controlled by a moral norm that requires arbitrary choices to be made between incomparable values.

This paper draws from two sources to answer the question about copyright's core content. First, legal theories on natural law, requiring man-made positive laws to be derived from an objective moral premise, support a proposition that copyright laws have essential self-evident moral content that may be identified through reason. To be legitimate rules, copyright laws must abide by the rule of law, be inherently moral, and be ends in themselves and not instruments to achieve policy goals. Copyright laws must promote justice and fairness through the manner in which literary and artistic works are accessed, used, and disseminated by creators, publishers, and the public. The law must clearly differentiate between proprietary rights in creative works and economic privileges to use the work, conform to an ethic of prudence and reasonableness in any action taken to expand or re-

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range of values we hold dear in the twenty-first century . . . my book dovetails with the broad contemporary movement in international intellectual property circles to reconsider this law as a tool for promoting human development and not GDP or efficiency alone.").

21. Lewis Hyde does touch upon some basic values, such as the act of self-expression as a form of reverence for the divine, which may provide ultimate reasons for choice and action. *See* LEWIS HYDE, COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP 18–22, 78–80 (2010).

22. *See* Karin Barber, *Popular Arts in Africa*, 30 AFR. STUD. REV. 1, 13–15, 34–35 (1987) (discussing the development of a definition of popular arts in Africa and how defining art will affect its treatment by society); Haidy Geismar, *Copyright in Context: Carvings, Carvers, and Commodities in Vanuatu*, 32 AM. ETHNOLOGIST 437, 439 (2005) (arguing "Vanuatu have, over a lengthy period of time, strategically drawn an analogy between highly specific local entitlements and more international notions of copyright to assert significant economic and political agency in local, national, and international domains of exchange."); Robert French & Keith T. Kernan, *Art and Artifice in Belizean Creole*, 8 AM. ETHNOLOGIST 238 (1981) (showing the importance of speech performance and verbal art for the Belizean Creole communities).

strict rights, and realize that a cultural ecology must replace the copyright economy to produce an ethos where creativity in all respect thrives.

Second, this paper draws from Catholic social teachings on the common good (that would protect human flourishing instead of public welfare), respect for the life and dignity of the human person (that would identify with authentic authorship instead of romantic authorship), and correlation of rights and responsibility (that would impose moral duties instead of merely granting legal rights). These basic teachings further refine the basic values that could form the core content of copyright laws and allow non-arbitrary decisions to be made, as well as offer a framework to inform and shape appropriate copyright laws and policies. For the progress of science to be sustained, the core content of copyright laws must protect the conditions that contribute towards authentic forms of authorship and support the flourishing and thriving of relationship-oriented communities. By identifying core moral content to inform and guide the development of copyright law and policy, a healthy ecology for the production and distribution of creative works may emerge to produce greater equity in how literary and artistic resources are ultimately used in the information economy.

This paper is divided into three parts to make these arguments. Part II describes the propositions central to natural law theory, such as the centrality of the rule of law, the ideas that rules must be inherently moral, and that laws must be ends in themselves. It suggests that these propositions offer a workable framework to think about the difficult choices that a copyright system must make between protecting rights of authors, publishers, and the public. Part III applies these general propositions to the copyright system and analyzes how copyright analyses will change as one focuses on the actual content of the law rather than the ends produced by law. Part IV considers some of the hard questions that are likely to arise with the proposal that the core content of copyright law can be shaped by natural law and Catholic social teaching.

## II. Natural Law

Natural law is comprised of three interdependent propositions. The first and most fundamental proposition in natural law theory is that human choice and action must be directed towards purposes that are intrinsically good for human flourishing. The second and third propositions comprise two different sets of principles. The second proposition's set of principles provide intermediate moral norms that direct one's choice and action towards options that may be consistently chosen with a clear intention to facilitate human flourishing, while the third proposition's set of principles present "fully specific moral norms," which explicitly require or forbid certain choices, such as the norm that killing an innocent person is never per-

missible.[23] These propositions direct legal analysis to the actual content of the law and provide normative standards against which decisions for action may be more rigorously evaluated. By eschewing analyses of a law's social or economic result and focusing ethical inquiries on the intrinsic value of legal rules and political decisions, natural law theory allows reasons for certain actions and decisions to be examined through critical moral lenses rather than shroud those reasons under a veil of morality just because they purport to maximize public welfare. This is an important form of legal analysis because it requires reasons for action or non-action to be conclusive and determinative before they would be considered reasonable, rational, and moral reasons. It also avoids the dangerous presupposition that costs and benefits can commensurately be balanced in such a way that a decision maker would be able to know the choice that would bring about the greatest happiness to the greatest number of people.[24]

Natural law provides an important framework to think about the copyright system and the difficult choices that must be made between the interests of creators, publishers, and the public in literary and artistic works. A framework that focuses moral analyses on the reasons for, rather than the consequences of decisions is especially useful when evaluating the normative value of copyright laws, where choices between protecting the natural and economic interest of a work's creator is incommensurable with societal interest in accessing the work for educational, cultural, or research uses. As the interests of the creator and the general public are not comparable on a scale that would allow anyone to be sure that choosing one over the other would result in a maximization of public welfare, a choice between either would be arbitrary.[25] A mode of analysis that examines reasons for action rather than the choices themselves should be a welcomed analytical model in copyright jurisprudence. Natural law's reverence for individual dignity and human flourishing removes arbitrariness from decision-making by directing actions towards the common good and allowing individuals and communities to realize for themselves basic goods which contribute to their well-being.[26] Creativity and human expression contribute to individual and communal development in significant ways.[27] Copyright laws that embody the common good from a natural law perspective would therefore protect literary and artistic works because their protection will allow individuals and communities to realize for themselves basic goods that support their

23. GEORGE, *supra* note 19, at 102–04.

24. *Id.* at 119.

25. *See* Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117, 147 (1999) (showing how difficult it is to answer the normative question of how much intellectual property protection is required to maximize social welfare).

26. GEORGE, *supra* note 19, at 107.

27. *See* Colette Daiute, *Adolescents' Purposeful Uses of Culture*, *in* ART AND HUMAN DEVELOPMENT 169–72, 176–80 (Constance Milbrath & Cynthia Lightfoot eds., 2010) (discussing Vygotsky's theories on creativity and how human development affects culture).

development and not because their protection will ultimately promote public welfare.[28]

Copyright law today is considered "difficult, complex, and as a whole, unsatisfactory" because of a lack of foundational jurisprudence—it exists as a hodgepodge of various principles of "property rights, personal rights, and monopolies."[29] It aims to protect incentives to create for the purposes of maximizing public welfare, but it lacks fundamental principles or unifying concepts that link the notions of creativity, author's rights, public domain, and publisher's rights.[30] Natural law, a theory about essential truths connecting laws with broad moral precepts, embodies important foundational principles that may be used to develop the core of copyright laws irrespective of the aims they seek to achieve, whether they be to protect the author's natural rights, public welfare, or the incentive to create. The various notions about rights, entitlements, and social welfare may be unified through a common understanding of what it means to have moral laws that protect the common good and human dignity. Laws that are moral will embody the rule of law,[31] contain rules that are inherently moral,[32] and are ends in themselves.[33] These moral-political ideals central to natural law theory are effective benchmarks against which copyright laws may be assessed. Thinking about copyright from a natural law perspective emphasizes the morality of its core content and ensures that the effects of copyright rules serve the common good.

### *A. Centrality of the Rule of Law*

Natural law lawyers study the formal features of legal systems to evaluate their functions in light of their requirement that the law promotes justice and protects the common good. Professor Lon Fuller is perhaps most famous for laying out the eight ways in which a legal system may fail in this regard.[34] The eight ways are: creation of laws on an ad hoc basis, failure to publicize laws to those affected by them, abuse of retroactive legisla-

28. The catalogue of basic goods varies among natural law lawyers. *See* GEORGE, *supra* note 19, at 103 ("Basic human goods provide reasons for action precisely insofar as they are constitutive aspects of human flourishing.").

29. PATTERSON, *supra* note 1, at 8.

30. *Id.*

31. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23 (1980) (stating that natural law requires the exercise of authority in a community to be in accordance with the rule of law).

32. Positive rules that are inherently moral are derived from natural law, created for moral purposes, and posited for the sake of the common good. GEORGE, *supra* note 19, at 109.

33. *See* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 215–19, 227–28 (2006) (arguing that legal instrumentalism erodes the rule of law and ignores the common good).

34. LON L. FULLER, THE MORALITY OF LAW 39 (2nd ed. 1969) (stating that a "total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.").

tion, failure to make rules understandable, enactment of contradictory rules, enactment of rules that require affected parties to conduct themselves in ways beyond their powers, introducing frequent changes to legal rules, and failure to coordinate rules with their administration.[35] According to Professor Fuller, all eight ways produce a legal system that has completely failed. From the perspective of a natural law lawyer, who is concerned with policy makers and legislators making reasoned choices consistent with moral principles, laws in themselves must be practically reasonable in that they must be consistent, fair, just, and attentive to all aspects of human opportunity and flourishing. Individuals in society, who subject themselves to be governed by laws of their community to maintain order and guide action, must be aware of laws before they can be made to comply with them. Retroactive laws, laws that are incomprehensible or contradictory, and laws that demand more from their subjects than those subjects are capable of, pose a threat to human dignity by making individuals adhere to rules that cannot be reasonably complied with. As Professor Fuller pointed out:

> [T]here can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute.[36]

Though compliance with these principles may not ensure substantive justice in the copyright system, these principles establish the rule of law for legal order. Thus, the rule of law is not a legal rule in the conventional sense, such as the rule that only expressions and not ideas are protected through copyright laws.[37] Instead, the rule of law is a rule of virtue that requires laws to be relatively general, stable, and open so that laws may be followed and obeyed.[38] Individual legal rules such as the idea/expression dichotomy ensure public access to ideas. And while the idea/expression dichotomy is a substantive rule about the proper subject matter of copyright protection, it does not provide legal order to the law because the generality and ambiguity surrounding its application does not produce certainty in the law.[39] The qualities of clarity, certainty, predictability, and trustworthiness

35. *Id.*

36. *Id.*

37. Baker v. Selden, 101 U.S. 99, 102 (1879).

38. *Cf.* JOSEPH RAZ, THE AUTHORITY OF LAW 213–16 (1979) (advocating several principles for valid laws, including: (1) "all laws should be prospective, open, and clear;" (2) "laws should be relatively stable;" and (3) "the making of particular laws and (particular) legal orders should be guided by open, stable, clear, and general rules").

39. Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 324 (1989) ("It is not a doctrine that could be used predictably to put a particular work either into the public domain or within the author's exclusive rights; instead, it seems to be an ex post facto characterization that justifies an outcome based upon other, more concrete, factors. Thus, if

in how creative expressions and their underlying ideas are shared are essential elements to the rule of law because they facilitate social interaction and community growth. These qualities would be desirable in the copyright system for their own sake because they provide individuals with the tools they need to make dignified choices about their creative endeavors.[40]

However, the qualities of clarity, certainty, predictability, and trustworthiness are not evident in the basic rules governing creative production, such as the rule that only original expressions, and not mere ideas, are protected. Copyright law, for example, does not define what originality means even though the law clearly states that it protects "original works of authorship."[41] The House Report explained that this phrase was deliberately left undefined in the current Copyright Act of 1976 to allow the standard for originality established by the courts under the old law, the Copyright Act of 1909, to be used with the new law.[42] Despite this fundamental copyright requirement that works of authorship be original, the legislature has provided very little guidance as to what might amount to an original work.[43] Courts have inferred that originality would be a feature that emanates from the act of authorship:

> [A]uthorship presumptively connotes originality. Thus the term "author" is defined as "the beginner . . . or first mover of anything; hence, efficient cause of a thing; creator; originator; . . . a composer, as distinguished from an editor, translator or compiler." In music, "to compose" is defined as "to construct by mental labor; to design and execute, or put together, in a manner involving the adaptation of forms of expression to ideas, or to the laws of harmony or proportion." And in the literary field, which comprehends—though with an occasional cynical doubt—such items as the lyrics for popular songs, "to write" signifies, "to frame or combine ideas, and express them in written words; to compose, as an author."[44]

Despite the courts' pronouncement that an original work begins with an act of authorship, the level of authorial activity that gives rise to exclusive property-type rights in creative works remains unclear. A creator is not

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the outcome in a particular case is to be infringement, the work is deemed to be protectable expression; if the outcome is to be noninfringment, then the work is described as an 'idea.' ").

40. FINNIS, *supra* note 31, at 271–72 (discussing how the extension of law into new subject areas, such as consumer-supplier relations, helps to protect self-direction and freedom from some types of manipulation).

41. 17 U.S.C. § 102(a) (2012).

42. H.R. REP. NO. 94-1476, at 51 (1976) (stating that the "phrase 'original works of authorship,' which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute [the 1909 Act]").

43. The 1909 Act neither defined originality nor expressly required that works be original before they can be protected. MELVILLE B. NIMMER, PAUL MARCUS, DAVID A. MYERS & DAVID NIMMER, CASES AND MATERIALS ON COPYRIGHT 3 (7th ed. 2005).

44. Remick Music Corp. v. Interstate Hotel Co. of Neb., 58 F. Supp. 523, 531 (D. Neb. 1944) (quoting Webster's New International Dictionary, 1925).

entitled to a copyright based on hard work and labor; what the law requires is creative expression.[45] Yet, a creator need not make appreciable artistic contributions to the body of creative works to be entitled to exclusive rights.[46] Anything more than mere trivial variations of another artist's work would satisfy the requirement of originality and be sufficient for a work to be protected.[47] The requirement of originality, while a low standard, sets the baseline for distinguishing protectable works from non-protectable works and private exclusive rights from public interests integral to any property rights system. But this legal threshold does not provide the predictability in the law so essential for the ordering of private affairs in a just and equitable legal system that adheres to the rule of law. The low standard for acquiring exclusive rights allocates rights over creative expressions in such a way that it is difficult to know where the proper boundaries of private rights lie. One could, for example, easily infringe a copyright without the deliberate intent to infringe through the doctrine of subconscious copying, which imposes liability on a defendant who accidentally reproduces a work from prior exposures to it.[48] The fair use doctrine, which allows unauthorized uses of creative works in circumstances that are considered fair, is also notoriously ambiguous to the point that creators of literary and artistic works are not able to decisively plan a course of creative development for fear of litigation.[49]

It is essential for the copyright system to clarify legal rules that set the balance between private property claims of individuals and the collective interest in personal liberty for the rule of law to thrive. The rule of law compels the passing of rules through positive law that protects individual rights, but at the same time, provides members of society with clear, concise, and predictable rules that may be easily obeyed. The late Ronald Dworkin famously advanced a view of the rule of law that ultimately safeguards individual rights above collective interests.[50] In this sense, the copyright system must protect rights of individual creators in their expressions. Additionally, the rule of law must also compel the promulgation of laws that are capable of being obeyed. As Joseph Raz explains, an individual can conform to the law only if he has knowledge about the rules: "if the law is to be obeyed it must be capable of guiding the behavior of its subjects. It

45. *See* Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991).

46. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–50 (1903) (artistic merit is not a prerequisite to copyright).

47. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102–03 (2d Cir. 1951).

48. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482–83 (9th Cir. 2000).

49. *See* RICHARD L. SCHUR, PARODIES OF OWNERSHIP: HIP-HOP AESTHETICS AND INTELLECTUAL PROPERTY LAW 103 (2009) (arguing that the ambiguity of the fair-use doctrine has had a chilling effect on some artistic activity, especially that of African American artists, writers, and musicians).

50. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 92 (1978).

must be such that they can find out what it is and act on it."[51] Copyright rules setting boundaries between individual rights and public interest must be further clarified to provide members of society with clearer and better guidance in the use and production of creative works.

### *B. Rules Must Be Inherently Moral*

To be legitimate legal rules, rules must also be inherently moral in that they must be just. In this respect, Michael S. Moore has stated that "*necessarily*, law cannot be too unjust and still be law."[52] To a natural law lawyer, justice is one of the fundamental essentials that a law must embody.[53] Thus, for Aristotle, a law that is just must have certain attributes of proportionality where individuals can expect to receive their share of entitlement or retribution in proportion to their action in society.[54] As an example, rights, powers, and privileges granted by the state should be proportionate to one's contribution to society. Conversely, punishment meted out for a crime must be commensurable with the wrongful act. Hence, punishing a person justly means punishing in proportion to the crime.[55] The fairness of many of the rules in the copyright system is, from this vantage point, questionable because of the pronounced disproportionality of punishment to the infringing act.[56]

In *Sony Music Entertainment v. Cassette Production, Inc.*,[57] $9.1 million was awarded for the willful piracy of ninety-one sound recordings belonging to Sony at $100,000 per sound recording as statutory damages. Sony managed to establish that the defendant had willfully infringed their copyright by the unauthorized reproduction and distribution of the sound recordings, and the court found that the "particularly egregious and willful nature of [the defendant's] conduct" justified the amount of the award.[58] The exercise of discretion by the court in the award of statutory damages is,

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51. RAZ, *supra* note 38, at 214.

52. MICHAEL S. MOORE, EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE 304 (2000).

53. *Id.* at 305.

54. *See* ARISTOTLE, NICOMACHEAN ETHICS 89 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000) (Aristotle's view of proportional justice was based on a reciprocity of exchange between individuals that binds them together in a society; thus where one has received a gracious gesture from another, one should be obliged to perform a "return service" and be gracious by oneself, which would consequently produce what Aristotle called "proportionate reciprocation").

55. *See* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 719 (Michel Rosenfeld & András Sajó eds., 2012).

56. The Copyright Act of 1976 allows a copyright owner to elect to recover statutory damages instead of actual damages and profits with respect to any one work for a sum not less than $750 or more than $30,000 as the court considers just, 17 U.S.C. § 504(c)(1). In cases where the copyright owner sustains the burden of proving infringement, and the court finds that such infringement was committed willfully, the court may in its discretion increase the award of statutory damages to a sum of not more than $150,000. *Id.* at § 504(c)(2).

57. 41 U.S.P.Q.2d 1198 (D.N.J. 1996).

58. *Id.* at 1203.

in the court's view, "the only deterrent that will have any effect on a Defendant" and in the future, prevent willful infringing acts.[59]

The award of $9.1 million to Sony in this case may have far exceeded the necessary amount to serve as a deterrent for willful infringement. Criminal law—whether intending to punish, deter, incapacitate, or rehabilitate the offender[60]—imposes some form of punishment on the individual who is convicted of committing the offense.[61] The teachings of natural law, however, require that the use of punishment to protect any ideal of social justice must "be proportionate to the good sought and must use the least destructive means of achieving that good."[62] Thus, while a cold-blooded murderer may have committed a heinous crime, seeking the common good would require the protection of society and the murderer, even as the urge to repay the murderer in kind stirs among other members of society. Looking at the death penalty and life imprisonment from a natural law perspective, life imprisonment usually would serve the common good by protecting society from the murderer while respecting the dignity of the criminal.[63] The least destructive or harmful means of achieving the common good must be chosen.

Likewise in copyright law, the common good must also be sought as the law seeks to deter willful infringement of copyrighted works. In this respect, several options besides statutory damages are available to the courts—the grant of actual damages and profits as measured by lost profits and lost sales[64] and injunctive relief to prevent and restrain further infringement of the copyright.[65] Arguably, the grant of actual damages and profits is an effective deterrent against willful infringement if the aim of the infringer is to reproduce and distribute the copyrighted work to undercut the market for the original. In *Sony*, the defendant was estimated to have made as much as $2 million in profits from the distribution and sale of the sound recordings.[66] An award of this amount to Sony would act as a deterrent, as the infringer is deprived of the anticipated gains from the infringement and

59. *Id.*

60. The purposes of the criminal law exist to varying degrees in different types of regulation and penal codes and present a multi-faceted value system for the law. On the relationship between these different aims of the law with the criminal system, *see generally* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

61. *See, e.g.*, Ian A.T. McLean, *Criminal Law and Natural Law*, *in* COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 259, 261 (Edward B. McLean ed., 2004) (stating that criminal law is a unique body of law because "it prefers, in first resort, violence as a response to activity that deviates from a rule"; a person who commits a crime, for example, may have his liberty deprived, home searched, and be compelled to provide intimate parts of his being such as breath, blood, urine, skin, or hair samples for investigation).

62. *Id.* at 275.

63. *Id.* at 275–76.

64. 17 U.S.C. § 504(b) (2012).

65. 17 U.S.C. § 502 (2012).

66. 41 U.S.P.Q.2d 1198, 1201 (D.N.J. 1996).

is discouraged from engaging in future acts of infringement. The award of statutory damages of up to $100,000 for the infringement of one sound recording is excessive and disproportionate. It is also arguable in this case that injunctive relief should not be granted where the copyright owner is not the natural author of the work and does not have a personal connection with its expression.[67]

To be inherently moral, the rules on copyright remedies must secure proportionate deterrence to wrongful acts of infringement and be imposed for the common good instead of the protection of the copyright owner's market interest. The law may also need to avoid strict-liability rules for infringement, where an innocent infringer may still be liable for an act of infringement despite a lack of knowledge that he is committing an act of infringement[68] and to avoid punishing individuals for activities they subjectively believe to be legitimate. Fault-based liability is important in ensuring that copyright rules are inherently moral because the use of expressions in itself is not a wrongful act. In fact, some scholars believe that use of creative resources is desirable to long-term technological, economic, and cultural development.[69] Unduly harsh punishment for the use and distribution of creative works—whether in the form of disproportionate punishment or strict-liability—will only deter the sharing of cultural resources that would ultimately facilitate individual expression for the common good.

### *C. Laws Must Be Ends in Themselves*

To conform to natural law, copyright laws must also be ends in themselves rather than means to an end. As ends in themselves, laws must seek the common good of society and those they govern. As Baron de Montesquieu explained, positive laws are an embodiment of social and group cohesiveness—man's natural desire to be united as a community.[70] The government must therefore pass laws for the good of the people. St. Thomas Aquinas, in the same light, saw every individual as a "part of a

67. *See* Alina Ng, *Literary Property and Copyright*, 10 Nw. J. Tech. & Intell. Prop. 531 (2012) (arguing that injunctive relief should only be granted to authors of a work; that such rights of authors be protected by a property rule while the rights of publishers and other copyright owners, who are not natural authors of the work, be protected by a liability rule).

68. *See* Buck v. Jewell-Lasalle Realty Co. 283 U.S. 191, 198 (1931) (stating "[i]ntention to infringe is not essential under the [Copyright] [A]ct").

69. *See, e.g.*, Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031, 1032 (2005) (suggesting that "the effort to permit inventors to capture the full social value of their invention . . . [is] fundamentally misguided"); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 Colum. L. Rev. 257, 258 (2007) (arguing that contrary to common assumptions, "spillovers actually encourage greater innovation").

70. These positive laws govern nations and the "united strengths of individuals." A government that is "most conformable to nature is that which best agrees with the humor and disposition of the people in whose favor it is established." Baron de Montesquieu, The Spirit of Laws 5–6 (2002).

perfect whole that is the community."[71] "Therefore law must concern itself in particular with the happiness of the community;"[72] where the "intention of the legislator is directed at the true good, (i.e., the common good) and regulated according to the principles of divine justice, it follows that the law will make men good absolutely."[73] This non-instrumental quality of the law, where the law possesses a core integrity that is tied to the service of the common good, is important for the copyright system because its rules will protect expressive and culturally significant activities that are integral to the dignity and well-being of individuals. The ability of individuals to realize for themselves basic goods, such as the freedom to create and express, will allow human nature to flourish through the sharing and dissemination of creative resources, cultural expressions, and intellectual products. This form of human flourishing can only be supported when the law is not used as an instrument for policy goals and is instead an end in itself.

Professor Brian Z. Tamanaha has, however, pointed out that for more than two hundred years, legal jurisprudence in the United States has tended to ignore the ideal that laws must be limited by fundamental principles of the rule of law and represent the common good of society.[74] As Professor Tamanaha suggested, this may have been attributable to a variety of reasons, including:

> The implications of the Enlightenment, the secularization of society, doubts about the existence of objective moral principles, a culturally heterogeneous and class-differentiated populace, pitched battles within society among groups with conflicting economic interests in the late nineteenth century, an increasingly specialized economy with complex regulatory regimes far beyond the ken of common law concepts, [and] the disenchantment of the world in the twentieth century . . . .[75]

More importantly, Professor Tamanaha observes that after the "denouement" of distancing the law from its core integrity, "the only substantive restrictions on legislation were those found in the words of the Constitution."[76] One may observe that without any core moral content that aims to protect the common good, copyright laws may embody policy goals set by Congress with Congress's powers limited only by the patent and copyright clause of the U.S. Constitution.[77]

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71. ST. THOMAS AQUINAS ON POLITICS AND ETHICS 44 (Paul E. Sigmund ed. & trans., 1988).

72. *Id.*

73. *Id.* at 47.

74. TAMANAHA, *supra* note 33, at 215.

75. *Id.* at 217.

76. *Id.*

77. U.S. CONST. art. I, § 8, cl. 8 states that "Congress shall have Power To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

Nevertheless, the twin landmark Supreme Court cases of *Eldred v. Ashcroft*[78] and *Golan v. Holder*[79] demonstrate that the constitutional limitation on Congress's power does not provide any assurance that the common good will be protected. In *Eldred*, the Supreme Court affirmed the constitutionality of the Copyright Term Extension Act, which delayed a work's entry into the public domain by twenty years,[80] deciding that Congress was the better judge of what was necessary to encourage "American and other authors to create and disseminate their work in the United States."[81] The Court went on to state that courts were "not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."[82] It was Congress's prerogative to extend the copyright term if the extension would ensure an equal protection of American works in Europe and provide incentives for the creation and dissemination of works in the United States.[83] In *Golan*, the Court upheld the constitutionality of the Uruguay Round Agreement Act, a 1994 law passed by Congress to fulfill the trade obligations under the Trade Related International Property Rights Agreement.[84] Section 514 of the Uruguay Round Agreement Act restored copyright to works that were in the public domain for reasons other than the expiration of copyright.[85] Passed to fulfill trade obligations under the Uruguay Round Agreement and to perfect the implementation of the Berne Convention,[86] the law served national trade policies rather than the common good. One may observe from both *Eldred* and *Golan* that the only constitutional limitation Congress had under the copyright clause is that Congress may pass laws that promote the progress of science within its constitutional authority. And the courts in *Eldred* and *Golan* made it clear that they will not second-guess the rational choices that Congress makes while acting within its authority even if those choices may not be in the interest of the common good.

78. 537 U.S. 186 (2003).

79. 132 S. Ct. 873 (2012).

80. 537 U.S. at 204; 17 U.S.C. § 302 (2012).

81. 537 U.S. at 206–08.

82. *Id.*

83. *Id.* at 205–06.

84. *See* 132 S. Ct. at 894 (holding that passage of section 514 of the Uruguay Round Agreement Act was within the power of the political branches, and that the court is satisfied that it does not "encounter any constitutional shoal").

85. Works that should be protected by copyright may fall into the public domain in one of three ways: (1) the United States did not protect works from the country of origin at the time the work was published; (2) the work is a sound recording that was fixed before the United States started protecting sound recordings as a copyrightable work in 1972; and (3) the author of the work had not complied with certain statutory formalities in the United States, such as the requirement that the work be registered, when the work was produced. In 1994, section 514 was codified in the U.S. Copyright Act as 17 U.S.C.A. § 104A, which treats restored work as "if the work never entered the public domain in the United States." Uruguay Round Agreement Act of 1994 § 514, 17 U.S.C. § 104A (a)(1)(B) (2006).

86. *See Golan*, 132 S. Ct. at 877–78 (providing a brief synopsis of the United States' implementation of Berne).

Both cases show copyright law being used as a means or instrument to an end—the promotion of the progress of science. They demonstrate that the law's core content need not be consistent with any objective standard of morality. Copyright laws here were instruments to further trade or social policies and could be filled with "congressional determinations and policy judgments."[87] By adopting a deferential view towards such determinations and judgments, courts have also renounced the common good in copyright law; these laws are constitutional as long as the law promotes the progress of science. Nonetheless, copyright law that serves the common good must not only be constitutional. It must have a core integrity that will determine the proper content of the law and prevent it from being used as an instrument to pursue trade or social policies. When law is seen as an end in itself, one would understand the purpose of the law as serving the common good and its core content comprising fundamental principles of right and wrong. When copyright laws are passed as ends in themselves, they will allow creators and users of creative works to engage with literary and artistic resources in ways that will ultimately support human flourishing in society.

## III. Shaping Appropriate Copyright Laws and Policies

The first proposition of natural law identified in Part II encompasses broad rules that ensure the conformity of positive law to natural law. These universal and general rules apply across the board to various legal regimes and different areas of the law. Second-level principles are more concrete, direct, and instructive moral principles that would help refine the core content of copyright laws. Catholic social teaching offers specific guidance that may be used to shape the core content of copyright law. Teachings on the common good that emphasize human flourishing instead of public welfare, respect for the life and dignity of the human person, and the correlation of rights and responsibility provide a more specific set of principles to inform and shape appropriate copyright laws and policies.

### *A. Common Good and Human Flourishing*

Copyright law may be reoriented towards the common good and human flourishing and away from public welfare in the utilitarian model with natural law. With reorientation, a human and cultural ecology that depends on an interconnected network of relationships for growth would probably replace the system of economic incentives. Conceivably, a moral norm for the common good would mandate that literary and artistic works be made more accessible to fair non-commercial uses of such works to allow education, research, and cultural experiences to thrive within smaller communities and local groups. The principle of subsidiarity in Catholic social teaching emphasizes limiting the role of the nation state and govern-

87. *Eldred*, 537 U.S. at 208.

ment in the organization and activities of smaller and lesser social orders such as individuals, family units, and organic unions. Government's role in society is to serve communities and social activities without overt interference and management. The principle protects individual freedom, encourages personal initiative, and reduces government bureaucracy by requiring states to enable their citizens in their individual and communal capacities so that they may readily engage in activities that promote human flourishing. The principle of subsidiarity thus states that:

> [A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.[88]

But it is important to realize that the modern nation state and the capitalist economy may covertly "curtail, absorb, or undermine the functions of more organic local communities" as one thinks about the common good and protection of the ability of lower order communities to flourish.[89] As Joshua P. Hochschild explains:

> [T]he principle of subsidiarity does much more than provide another argument against the grasping nation state. For one thing, its scope is wider. Even if papal documents most often find occasion to invoke the principle when discussing the state, the principle is concerned not narrowly with specifically public, state power, but with general relationships between parts and wholes in any community. It can apply not only to different levels of government, but also within families and private associations, within corporate administration, within ecclesial polities, or within different parts of the economic order.[90]

The market for copyrighted works, which replaced the patronage system as the primary form of remuneration for authors,[91] interferes with the types of creative works that are produced to a large extent. Judge Leval remarked in his decision in *American Geophysical Union v. Texaco, Inc.*, that "[t]he copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . . The profit

88. CATECHISM OF THE CATHOLIC CHURCH NO. 1883 (Doubleday 1995) (internal quotation marks omitted) (quoting Pope John Paul II, *Centesimus Annus* [*Encyclical Letter on the Hundreth Anniversary of Rerum Novarum*], ¶ 48 (1991), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html).

89. Joshua P. Hochschild, *Natural Law: St. Thomas Aquinas and the Role of Reason in Social Order*, *in* THE HEART OF CATHOLIC SOCIAL TEACHING: ITS ORIGINS AND CONTEMPORARY SIGNIFICANCE 113, 120 (David Matzko McCarthy ed., 2009).

90. *Id.*

91. For a historiography of the copyright market, see WOODMANSEE, THE AUTHOR, ART, AND THE MARKET, *supra* note 2.

motive is the engine that ensures the progress of science."[92] The emphasis on market profits as the primary motivation for creativity in the copyright system undermines individual freedom to be truly creative by encouraging authors to produce for the masses.[93] But, the emergence of the Internet has allowed collaboration for social production of creative materials such as Wikipedia and other forms of open-source content through peer-to-peer networks in ways that are antithetical to the market.[94]

The very existence of the market for creative works will nonetheless undermine the principle of solidarity in Catholic social teaching as the market regulates the relationship between creator and his audience. The ability of copyright owners to set super-competitive market prices for the use of their work prevents most individuals and local communities from using the work to create new types of content or engage in free speech with the content. Market control by copyright owners also produces barriers to competition from less established creators and restricts their ability to engage in free expression.[95] The appropriation of indigenous or grassroots expression by larger corporations without proper acknowledgement of the source and origin of the expression will also undermine the common good and prevent human flourishing from the production of creative works such as music, art, and literature. For example, the appropriation of Solomon Linda's "Mbube" by Peter Seeger (who turned the song into "Wimoweh" in the 1950s), which was rewritten as "The Lion Sleeps Tonight" by American music legend George Weiss without acknowledgement or attribution—while claiming copyright over the song—is a direct interference by a conglomerate with folk music and the communal life of African tribes, which again clearly undermines the principle of solidarity.[96] To conform to the principle of solidarity, it is important for copyright laws to support creative activities of lower order communities, such as tribes, families, and social groups, by protecting their expressions from appropriation and coordinating their activities with the rest of society, which includes large copyright producers and other users of creative works, in ways that will allow creators from these communities to flourish and thrive as human beings.

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92. 802 F. Supp. 1, 27 (S.D.N.Y. 1992).

93. For the effect of the market on creativity, see Alina Ng, *The Author's Rights in Literary and Artistic Works*, 9 JOHN MARSHALL REV. INTELL. PROP. L. 453, 468 (2009) (arguing that since the author's market reward for creativity will be based on how much the paying public are willing to pay for the work, authors have the incentive to produce works that have the widest public appeal).

94. *See generally* YOCHAI BENKLER, THE WEALTH OF NETWORKS (2006) (arguing that the "networked information economy" is displacing the industrial information economy, resulting in the increased importance of nonmarket and nonproprietary motivations and organizational forms to the information production system).

95. NETANEL, *supra* note 20, at 131.

96. SUNDER, *supra* note 20, at 87.

### *B. Authentic Authorship and Human Dignity*

With the focus on human dignity as emphasized in Catholic social teaching, one could also observe a lessening of emphasis on notions of the romantic author and genius creator, used primarily by book sellers and book publishers to justify copyright ownership and establish the author as the proprietor of the work as the modern literary market grew.[97] Contemporary copyright scholars such as Peter Jaszi, Martha Woodmansee, and Jessica Litman, however, have pointed out that these notions are problematic because the idea that an individual produces something that is wholly original is not a true reflection of how creative works are actually produced. Authors are seldom entirely original and most creative works are actually derivative, being produced through the use and reuse of existing literary and artistic materials.[98] The notion of the author and authorship as an activity has been deconstructed and rendered void of any real meaning. As Jaszi explains, legal scholars have tended "to mythologize 'authorship,' leading them to fail (or refuse) to recognize the foundational concept for what it is—a culturally, politically, economically, and socially constructed category rather than a real or natural one."[99] This has, in turn, been used to entrench the values of possessive individualism and market commodification of creative works and can be used to "interfere with the further development and smooth functioning of that market."[100]

However, there will likely be a shift from emphasis on originality, ingenuity, and individualism toward authenticity, perceptiveness, and communality as copyright laws begin to acknowledge the human dignity inherent to expressive endeavors, the process of creativity, and the pursuit of knowledge. This, in turn, will rightfully identify the individual as the source and actual creator of the work. Despite post-modern literary critics such as Michel Foucault and Roland Barthes, who have denounced the autonomous individuality of an author in relation to his written words,[101]

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97. *See* Mark Rose, *The Author as Proprietor:* Donaldson v. Becket *and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 56 (1988) (discussing "the emergence of the mass market for books, the valorization of original genius, and the development of the Lockean discourse of possessive individualism" during the period of the legal and commercial struggle over copyright).

98. WOODMANSEE, *supra* note 2, at 36 (noting that authors were never regarded as distinctly and personally responsible for their creations before the mid-eighteenth century); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 460 (1991); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 965 (1990).

99. Jaszi, *supra* note 98, at 459.

100. *Id.* at 501.

101. *See* Roland Barthes, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142, 142 (Stephen Heath trans., 1977) ("As soon as a fact is narrated no longer with a view to acting directly on reality but intransitively, . . . finally outside of any function other than that of the very practice of the symbol itself, this disconnection occurs, the voice loses its origin, the author enters into his own death, writing begins."); MICHEL FOUCAULT, *What is an Author?*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 114, 116–17 (Donald F. Bouchard ed., Sherry Simon trans. 1977) (arguing that modern writing has "freed itself from the necessity of

Catholic social teaching maintains that the lives of individual human beings are of utmost importance and that human dignity is the foundation for any moral vision of a just society. It thus compels the acceptance of the author of creative works to be a human person who should rightfully be entitled to engage in the creative process and expression as a basic human good.[102] Since human beings are made in the image of God and flourish when in communion with the divine and with community, the act of creation and expression is a uniquely human activity that is rooted in humanity.[103] One would suggest that creativity and authorship is not, as more contemporary scholars argue, socially constructed. There is an inherent human dignity to the act of creativity, which is not connected to the commodification and sale of creative works on the market. To deny that basic humanity in expression would be to do violence to the human person.[104]

If the copyright system recognizes natural law as an appropriate foundation for its jurisprudence, then the human author must take center-stage and be protected differently. The law's current emphasis on originality would likely continue, but since the requirement for creativity is so low,[105] there may not necessarily be any personal connection between the author and the work. If so, arguably, the law need not protect the work with a property rule and grant injunctions when the work is infringed.[106] For corporate works, there is the same lack of personal connection between the work and a creator employed by a corporation. In cases where the infringement involves a work-for-hire, the rights of the corporate copyright owner should only be protected by a liability rule.[107] On the other hand, in instances where the work may be authentically attributed to the author, in that the author is the clear producer of the work even if the work is derivative of another, there will be a personal connection between author and the work.

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expression" and that a link between writing and death is "manifested in the total effacement of the individual characteristics of the writer" (internal quotation marks omitted)).

102. *S*ee MARY J. MCDONOUGH, CAN A HEALTH CARE MARKET BE MORAL?: A CATHOLIC VISION 32 (2007) (arguing that the right to full human development requires basic rights and that "to achieve these rights, people must be able to participate in the economic, political, and social processes that affect their lives").

103. *See id.* ("Because all people are created in the image of God, they have an innate and inalienable value or dignity. . . . The specifics of human dignity can be ascertained only by viewing the individual person within his or her particular societal context and in relation to other people.").

104. In Catholic social teaching, violence is "any human action that causes harm to the life or dignity of another person." JERRY WINDLEY-DAOUST, LIVING JUSTICE AND PEACE: CATHOLIC SOCIAL TEACHING IN PRACTICE 290 (2nd ed. 2008).

105. H.R. REP. NO. 94-1476, at 51 (1976); NIMMER ET AL., *supra* note 43, at 3.

106. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (arguing that "entitlements," which are protected by property, liability, or inalienability rules, can be integrated with Tort law concepts allowing state judgment regarding the enforcement of competing "entitlements").

107. *Cf. id.* at 1106–10 (discussing liability rules in the negotiation and valuation of property entitlements).

Famous works have been derivative, such as John Milton's *Paradise Lost*,[108] but may nonetheless be considered an authentic work of a human author in that the work may be clearly attributable to the author. In such cases, the author's rights should be protected by a property rule that would grant injunctive relief to prevent further use of the work in situations where the use conflicts with the author's personal and creative interest. To justify the grant of an injunction for infringement of creative works, the law must expect something more than a minimal degree of creativity from the author; the law must expect authentic creations that resonate with an individual author's basic human need to express and create. A grant of injunctive relief should protect the author's human dignity and not his or her commercial interests. Conceivably, the protection of human dignity would require the separation of personal and economic interests in creative works with different rights and remedial action for infringement of each right.

### *C. Moral Duties as a Corollary to Legal Rights*

While Catholic social teaching acknowledges individual rights to basic goods in society, it also emphasizes individual responsibility to the community in which one lives and works, and on a larger scale, to society as a whole. Pope John XXIII, in his Encyclical Establishing Universal Peace in Truth, Justice, Charity, and Liberty, Pacem in Terris, stated that natural rights of man "are inextricably bound up with as many duties, all applying to one and the same person."[109] These natural rights and duties "derive their origin, their sustenance, and their indestructibility from natural law, which in conferring the one imposes the other."[110] The Pope gave the following examples of natural rights and corresponding duties:

> [T]he right to live involves the duty to preserve one's life; the right to a decent standard of living, the duty to live in a becoming fashion; the right to be free to seek out the truth, the duty to devote oneself to an ever deeper and wider search for it.[111]

The Pope goes on to state:

> Once this is admitted, it follows that in human society one man's natural right gives rise to a corresponding duty in other men; the duty, that is, of recognizing and respecting that right. Every basic human right draws its authoritative force from the natural law, which confers it and attaches to it its respective duty. Hence, to claim one's rights and ignore one's duties, or only half fulfill them, is like building a house with one hand and tearing it down

108. JOHN MILTON, PARADISE LOST (Gordon Teskey ed., W. W. Norton & Co. 2005).

109. Pope John XXIII, *Pacem in Terris* [*Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity, and Liberty*], ¶ 28 (1963), *available at* http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html.

110. *Id.*

111. *Id.* at ¶ 29.

> with the other . . . . Since men are social by nature, they must live together and consult each other's interests. That men should recognize and perform their respective rights and duties is imperative to a well ordered society. But the result will be that each individual will make his whole-hearted contribution to the creation of a civic order in which rights and duties are ever more diligently and more effectively observed.[112]

Thus, in the copyright system, the grant of rights in creative works must be accompanied by certain moral duties. The grant of exclusive rights under section 106 of the Copyright Act[113] should be accompanied by the moral duty to make these works reasonably accessible to the public. Copyright owners have moral duties to avoid the imposition of monopoly prices that could prevent easy access to works by the general population.[114] Copyright owners should also, as a form of moral duty to make works more accessible to the public, cease the practice of moratorium, where works are removed from the market to keep demand and prices for the work high.[115] The essential facilities doctrine in antitrust laws, which allows a market competitor to gain reasonable access to a monopolist's product or service in order to compete with the monopolist,[116] may provide a model by which duties to provide public access to creative works may be carved out by the law.[117] Copyright laws would have to introduce reasonable restraints in how works are produced and used by copyright owners and other members in society to ensure that individual creators have the freedom to express themselves in ways that, as a whole, affirm the dignity of the person and promote human flourishing. To ensure the common good, rights of creators, publishers, and society as a whole must be tempered with moral duties to seek the common good.

Copyright law must also incorporate the principle of subsidiarity when thinking about moral duties as a corollary to natural and legal rights. Subsidiarity holds that there is a responsibility to serve lesser communities that

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112. *Id.* at ¶¶ 30–31.

113. 17 U.S.C. § 106 (2012).

114. *Cf.* NETANEL, *supra* note 20, at 131 (discussing the power of holders of copyrights in popular and iconic works over markets and expression).

115. *See* Alina Ng, *Copyright and Moral Norms*, 14 LOY. J. PUB. INT. L. 57, 92 (2012) (discussing the adverse effects of the practice of moratorium on society).

116. Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Laws*, 70 ANTITRUST L.J. 443, 446 (2002).

117. *See* Thomas Cotter, *Intellectual Property and the Essential Facilities Doctrine*, 44 ANTITRUST BULL. 211, 213 (1999) (arguing that the essential facilities doctrine could be used as a "method for imposing a duty to share one's intellectual property"); see also Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, 2004 E.C.R. I-5039 (discussing the essential facilities doctrine and concluding that "the refusal to grant a license for the use of an intangible asset protected by copyright entails an abuse of a dominant position" where the refusal is not objectively justifiable and the asset is essential to operating in a secondary market where the refusal of the license would result in the elimination of competition in that secondary market).

accompanies the recognition of rights and privileges. As Professor Hochschild states:

> [T]he principle of subsidiarity is not so much a principle about rights—the license to act without interference from above—as it is about duties or vocational responsibilities. Papal documents use the term *munus*, often translated as "task," "role," or "function," but the real sense of the term is *mission* or *vocation*, a *gift of service*. Thus it may be advisable to avoid altogether using the language of rights or even proper functions in characterizing the principle of subsidiarity; one scholar of Catholic social teachings describes it instead as a principle regulating *the plurality of gifts within a community*.[118]

Since positive law cannot determine nor dictate the function or gift of an individual or a community in a society, an important function of positive law would be to recognize individual and communal functions or gifts determined by natural law and support their flourishing. The primary task for the government is therefore to "recognize and foster the natural ordering of social gifts,"[119] rather than to distribute creative resources through the allocation of rights. Rights to use creative resources, whether granted under section 106 of the Copyright Act or through fair use,[120] would implicate moral duties to act responsibly toward the common good.

## IV. The Hard Questions

The proposal that natural law and Catholic social teaching could help shape the core content of copyright law raises hard questions. The most difficult question to answer is probably how one would reconcile the teaching that there are basic moral norms that are common to all with the observable fact that we live in a pluralistic society with different moral values, aims, and aspirations. Perhaps the strongest objection to a natural law conception of copyright is that there is more disagreement about the moral worth of particular actions taken by the law to facilitate and encourage creative production. If universal moral principles were discernible by everyone, then there would be no difficulty in choosing one course of action over another. For example, it should be easy for the law to decide between allowing free use of creative works where the user is not a market competitor of the copyright owner and disallowing all unauthorized uses of creative works to protect the copyright owner's market. But it is not as easy as it would seem, as the law struggles together with copyright proponents and

118. Hochschild, *supra* note 89, at 121 (citing Russell Hittinger, *Social Roles and Ruling Virtues in Catholic Social Doctrine*, 16 Annales Theologici 295, 301–02 (2002) (It.)).

119. *Id.*

120. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Colum. L. Rev. 1600 (1982) (arguing that the courts and Congress have employed fair use to "permit uncompensated transfers that are socially desirable but not capable of effectuation through the market").

opponents to maintain a workable balance between public rights and private entitlements.[121] Moral choices about what is the correct human action are not easily discoverable. Utilitarian choices that measure the sum of total happiness for the greatest number of people would seem the easier moral solution regardless of its shortcomings as a normative theory.

Despite the difficulty in identifying the correct choice of action according to natural law teachings, it is important to note that there is, as Professor Hochschild observes, a "surprising degree of agreement, across times and cultures, about the basic outlines of good human action."[122] For example, the Pauline Principle that "[e]vil may not be done for the sake of good"[123] reappears in Mahatma Ghandhi's teachings on non-violent resistance.[124] Catholic teachings on love for one's neighbors can also be found in Buddhist teachings about loving kindness in the world.[125] Teachings about the solidarity of family and communal life can be found in Africa's respect for the primacy of community.[126] And teachings about the natural order of life can be found in the teachings of Greek[127] and Chinese philosophy.[128] There is a commonality that exists in humanity that unites human beings as individuals. The correct choice of action would be in accordance with these principles. Additionally, introducing universal moral principles that are discernible through practical reason into the copyright system does not mean that these principles are easily identified. One would have to engage in rigorous moral inquiry to arrive at the morally right decision.

## V. CONCLUSION

This paper calls for a new normative standard for the copyright system—one that requires moral principles to be introduced into the copyright

121. For an overview of the struggle to reclaim public rights to use creative works, see PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).

122. Hochschild, *supra* note 89, at 117.

123. JOHN FINNIS, FUNDAMENTALS OF ETHICS 109 (1983).

124. *See* RICHARD DEATS, MAHATMA GANDHI: NONVIOLENT LIBERATOR 113–14 (2005) (quoting Mahatma Gandhi) ("I would say 'means are everything.' As the means, so the end. Violent means will give violent swaraj. . . . There is no wall of separation between means and end.").

125. *See* SANGHARAKSHITA, LIVING WITH KINDNESS: THE BUDDHA'S TEACHING ON METTA 11–14 (2004) (describing "metta," which can be translated to loving-kindness, as deep concern for the "well-being, happiness, and prosperity of the object of your metta, be that a person, an animal, or any other being").

126. *See* STAN CHU ILO, THE FACE OF AFRICA 306 (2006) ("The life of society is as important as the life of the individual, because the individual lives in time but the society is prior to the individual and outlives the individual.").

127. *See* ARISTOTLE, NICOMACHEAN ETHICS 114–15 (Roger Crisp ed. & trans., 2000) (discussing practical wisdom as a natural state of being).

128. *See* Dorothy Sisk, *Ethical Perspectives*, *in* DIVERSITY IN GIFTED EDUCATION 168, 172 (Belle Wallace & Gillian Eriksson eds., 2006) (describing the tenet of Taoism for achieving human happiness as "following the natural order, acting spontaneously and trusting instinctive knowledge").

system as foundational precepts. This paper also points out the shortcomings of utilitarianism as a basis for the copyright system, primarily because the values assigned to particular normative choices that are made are not commensurable on a definite scale. Natural law teachings, which form the central tenet of Catholic social teaching, offer an alternative but very appropriate normative theory that could provide much needed direction on how creative works ought to be produced and used in society. Individual expression is a fundamental activity and a product of being human. Our humanity requires our expressions to be authentic so that creativity may be seen as an activity that affirms human dignity rather than a purely market-centric endeavor. In her book, *The World Republic of Letters*, Pascale Casanova describes a global arena where political power dominates and controls literary expressions; where writers from dominated and marginalized literary spaces must struggle to find literary existence that is independent of the literary strictures imposed by dominating political and economic powers. She writes:

> [I]n those lands where the most ancient resources have permitted literature to emancipate itself (or nearly so) from all forms of external dependence, a remorseless ethnocentrism causes the formidable hierarchical structure of the literary world—the de facto inequality of its participants—to be rejected. Political dependence, internal translations, national and linguistic concerns, the necessity of constituting a patrimony in order to enter into literary time—all these things that constrain the purpose and the form of literary works from the margins of the republic of letters are at once denied and disregarded by those who lay down its laws in the center.[129]

Lawmakers sometimes deny and disregard the inequalities that are created through legal choices. At times these inequalities are severe, particularly when there are no objective moral standards to serve as a benchmark for evaluating decisions made and actions taken. In the copyright system, poor, minority, and indigenous communities bear disproportionate risk of injustice as the law makes choices in favor of those who hold greater economic and political power. Uses and production of creative works that are essentially market-driven will not support the common good, and the desire to reap market rewards enabled by the copyright system will not allow individuals in society to fully flourish. Human dignity is inextricably entwined with the ability to freely express oneself. A copyright system with natural law at its core will protect self-expression and ultimately benefit the common good.

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129. PASCALE CASANOVA, THE WORLD REPUBLIC OF LETTERS 353 (M. B. DeBevoise trans., 2004).