Copyright and Personhood Revisited

Christopher S. Yoo*

ABSTRACT

Personhood theory is almost invariably cited as one of the primary theoretical bases for copyright. The conventional wisdom, which typically invokes the work of Immanuel Kant and Georg Wilhelm Friedrich Hegel as its philosophical foundation, views creative works as the embodiment of their creator's personality. This unique connection between authors and their works justifies giving authors property interests in the results of their creative efforts.

This Essay argues that the conventional wisdom is fundamentally flawed. It is inconsistent both with Kant's and Hegel's theories about the relationship between property and personality and with their specific writings about the unauthorized copying of books. It also adopts too narrow a vision of the ways that creativity can develop personality by focusing exclusively on the products of the creative process and ignoring the self-actualizing benefits of the creative process itself. German aesthetic theory broadens the understanding of the interactions between creativity and personality. Psychologists, aestheticians, and philosophers have underscored how originating creative works can play an important role in self-actualization. When combined with the insight creative works frequently borrow from the corpus of existing works, this insight provides a basis for this insight provides a basis for broadening fair use rights. Moreover, to the extent that works must be shared with audiences or a community of like-minded people in order to be meaningful, it arguably supports a right of dissemination.

The result is a theory that values the creative process for the process itself and not just for the artifacts it creates, takes the interests of follow-on authors seriously, and provides an affirmative theory of the public domain. The internal logic of this approach carries with it a number of limitations, specifically that any access rights be limited to uses that are noncommercial and educational and extend no farther than the amount needed to promote self-actualization.

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* John H. Chestnut Professor of Law, Communication, and Computer & Information Science and Founding Director of the Center for Technology, Innovation and Competition, University of Pennsylvania.

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INTRODUCTION

Personhood theory figures prominently in virtually every list of justifications for intellectual property in general[1] and copyright in particular.[2] Typically ascribed to the philosophical ideas of Georg William Friedrich Hegel and Immanuel Kant, this theory posits that authors have such deep connections with their creations that respect for their sense of self

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[1] *See, e.g.*, ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE _ (6th ed. 2012); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 289–91 (1970); William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 171–72, 189–92 (Stephen R. Munzer ed., 2001); Seanna Valentine Shiffrin, *Intellectual Property*, *in* 2 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 653, 660 (Robert E. Goodin et al. eds., 2d ed. 2007).

[2] *See, e.g.*, Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1542 ("[W]orks of art are created through a person's mental labor, and thus embody more of her individual essence of being than works created through routine physical labor. Since artistic works are part of an artist's very identity, she never should be completely separated from the work.").

requires giving them a degree of ongoing control over those works.[3] In essence, works are treated as extensions of the author's person.[4] As such, certain types of interference with those works would be tantamount to intruding on a part of the author's body.

The most common legal embodiment of personhood theory in copyright law are so-called moral rights widely recognized in continental Europe and incorporated into the 1928 revision to the Berne Convention for the Protection of Literary and Artistic Works.[5] Although the details vary from jurisdiction to jurisdiction, in general moral rights give authors control over "whether, when, in what manner, by whom, and in what manner her work is presented to the public."[6]

The result is a strong vision of copyright that gives initial authors near absolute control over many aspects of copyright protection, including derivative works, to the exclusion of audiences and follow-on authors.[7] In many cases, personhood interests are so strong as to render moral rights inalienable.[8] In addition, the traditional approach to personhood theory only values creative works as static artifacts, with the only role in the development of personality being how

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[3] *See, e.g.*, 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 145 (2d ed. 1987); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 1, 26–29 (1988); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 359–61, 374–77 (1993).

[4] For an early statement, see Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940) ("When an artist creates, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use.").

[5] Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, 828 U.N.T.S. 221.

[6] Netanel, *supra* note 3, at 350. Although the term "moral rights" follows the French term *droit moral*, the concept is more accurate captured by the German term *Urheberpersönlichkeitsrecht*, which means author's rights of personality. *Id.* at 383 n.162; *accord* Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMPARATIVE L. 67, 92 (2007) (using the shorter form, *Persönlichkeitsrecht*).

[7] *See, e.g.*, Barbara Friedman, Note, *From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 CARDOZO ARTS & ENT. L.J. 157, 169 (1994) ("[M]odern commentators have for the most part used Hegel to defend near-absolute copyright protections, including derivative rights.").

[8] *See* Rigamonti, *supra* note 6, at 98 (tracing inalienability to the influence of 1 OTTO VON GIERKE, DEUTSCHES PRIVATRECHT 756 (1895)). For a review of the inalienability of moral rights, see Neil Netanel, *Alienability Restrictions and the Enforcement of Author Autonomy in United States and Continental Europe Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 48–77 (1994).

the works are treated after they have been created to the exclusion of the process of how works are created.

I believe that the conventional wisdom about the relationship between personhood and copyright suffers from some fundamental flaws. In terms of its supposed philosophical foundations in Hegel and Kant, the conventional wisdom is quite at odds with a close reading of Hegel's and Kant's analyses of the relationship between property and personality in general and their oft-overlooked writings specifically addressing the unauthorized publication of books.[9] Of particular note is the limited protection that both Kant and Hegel would accord to nonliterary and derivative works.[10] In so doing, the work of Hegel and Kant support a vision of copyright that is far less monolithic and uncompromising than the one associated with the traditional approach to personhood theory.

Furthermore, by focusing exclusively on how creative works are treated after they have been created, the conventional wisdom adopts an overly restrictive vision of the ways that creative expression can develop personality that ignores a broader range of ways, first suggested by the aesthetic writings of Kant and Friedrich Schiller, that creating works can promote a more unified sense of self. Since then, a vibrant literature in psychology, aesthetics, and philosophy has arisen that explores how the heuristic process of creating works can play a key role in self-actualization. A more encompassing conception of the relationship between personhood and creativity would regard creative works as more than mere repositories of personality and would examine how the process of creation itself can develop personality.

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[9] For Hegel's views, see GEORGE FRIEDRICH VON HEGEL, HEGEL'S PHILOSOPHY OF RIGHT ¶¶ 4–69 (T.M. Knox trans., Oxford 1952) (1821). For Kant's views, see Immanuel Kant, *Von der Unrechtmassigkeit des Biichernachdrucks*, 5 BERLINISCHE MONATSSCHRIFT 403 (1785), *translated in* Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *in* PRACTICAL PHILOSOPHY 23, 32 (Mary J. Gregor trans. & ed., 1996) (originally published in 1785); *see also* IMMANUEL KANT, THE METAPHYSICS OF MORALS 106–07 (Mary Gregor trans., 1991) (1797) (discussing "What is a book?").

[10] *See infra* Parts I.A.2 and I.B.2.

Reconceptualizing personhood-based theories of copyright in this manner provides a number of important insights. As an initial matter, my approach would move beyond the traditional approach of focusing on creative works as artifactual embodiments of authors' personalities to one that takes the interests of follow-on authors in using the creative process to develop their own personalities into account. To the extent that creativity necessarily builds on and extends the preexisting corpus of creative works, such a theory would provide an affirmative basis for insisting that follow-on authors have sufficient access to the existing corpus of prior works.

If this were all that was necessary, personhood theory would only yield a right of access for personal uses that omitted any right to share any derivative works created in this manner with anyone else. To the extent, however, that creativity must have an audience in order to be truly self-actualizing, my theory would provide a basis for a right to disseminate works created in this manner notwithstanding the fact that they borrow from prior works.

My approach also offers a possible response to one of the criticisms of existing copyright scholarship, which is the failure to provide a clear, affirmative theory of the public domain.[11] Indeed, even public domain advocates concede that the public domain remains defined largely in

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[11] Most trenchantly, Edwards Samuels asks whether "the public domain [is] simply whatever is left over the after various tests of legal protection have been applied?" or whether the public domain is animated by "some compelling public policy or legal principle, that gives it a life of its own, that would tend to attribute positive aspects to it," only to conclude "that there is no such animal: the public domain is simply whatever remains after all methods of protection are taken into account." Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y U.S.A. 137, 137–38 (1993); *accord id.* at 149 (concluding, after reviewing the proffered affirmative justifications for the public domain, that "it would appear that there simply is no such general theory"); *see also* Edward Samuels, *The Public Domain Revisited*, 36 LOY. L.A. L. REV. 389, 391 (2002) (reaffirming Samuels's belief that "what I said in 1993 is essentially still correct"); Vincenzo Vinciguerra, *Contributing to the Understanding of the Public Domain*, 24 J. MARSHALL J. COMPUTER & INFO. L. 411, 453 (2006) (noting that "the sum of the very different approaches and theories contribute to an image of the public domain as an 'empty box,' capable of every form and meaning, and thus, with no defined form altogether").

negative terms[12] and recognize the need for better articulation of affirmative theories of the public domain.[13] My revised personhood-based justification for copyright offers a basis for identifying a core of creative material that must remain in the public domain if individuals are to develop their sense of self.

Any theory providing an affirmative justification for copyright necessarily carries with it implicit limits. My reconceptualized personhood-based theory of copyright is no exception. As an initial matter, the scholarship on which it is based strongly contends that in order to be self-actualizing, creativity must exist as an end unto itself and not be instrumentally motivated to realize other objectives. This commitment strongly militates against extending the right of access and dissemination to works that are commercial in nature. It supports broader rights of access for educational purposes and more limited rights for nonchildren.

Moreover, the fact that the interests of follow-on authors must be balanced against the interests of initial authors dictates that any right of dissemination must be restricted only to the amount necessary for authors to develop their personalities. To conclude otherwise would avoid the problem of privileging the interests of initial authors over all others only to fall into the opposite trap of focusing exclusive attention on the interests of follow-on authors.

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[12] *See* James Boyle, *Foreword: The Opposite of Property*, LAW & CONTEMP. PROBS. Winter/Spring 2003, at 1, 30 ("The term 'public domain' is generally used to refer to material that is unprotected by intellectual property rights . . .."); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968, 976 (1990) (describing the public domain as "a commons that includes those aspects of copyrighted works which copyright does not protect" and "the realm comprising aspects of copyrighted works that copyright does not protect"); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 217 (2002) ("Often the public domain is defined in terms of what it is not.").

[13] *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 361–62 (1999) ("The particular weakness of the traditional definition of the public domain is that it evokes an intuition about the baseline, while not in fact completely describing it."); James Boyle, *Cultural Environmentalism and Beyond*, LAW & CONTEMP. PROBS. Spring 2007, at 5, 8 n.11 (recognizing that "we do need a better theory of the public domain," while acknowledging that the result may be multiple, overlapping theories).

The result is a reconceptualization of personhood-theory of copyright that is more consistent with the philosophical foundations on which personhood theory is traditionally based and that takes into account a broader range of mechanisms through which creative works can promote self-actualization. It supports an affirmative basis for recognizing a right of access (and perhaps dissemination) by follow-on authors, while simultaneously balancing them against the interests of initial authors.

The Essay is organized as follows: Part I revisits the manner in which the conventional wisdom invokes Hegel and Kant by taking a close examination of their theories of property in general and their analyses of unauthorized copying of books in particular. It points out that the narrow focus on the disposition of the creative work reflects a fundamental misunderstanding of these thinkers' theories of the role that property plays in defining personhood. A close reading of their copyright-related works also yields a vision of copyright that is far less protective of the rights of initial authors than is generally understood.

Part II examines the aesthetic tradition exploring the role that creativity serves in developing a person's faculties and personality, taking as its starting point the seminal work of Kant and Schiller. Although Kant and Schiller offered a passive vision of play in which audiences simply contemplate great works of art, later psychologists, aestheticians, and philosophers articulated a more active vision in which individuals actively engage in the creative process. It culminates in a theory that recognizes that individual self-actualization may depend on people becoming authors themselves. Drawing on the work recognizing that creativity often builds on prior works, this theory suggests that individual self-development may require a degree of access to the preexisting corpus of creative works. It then explores whether, in addition to

being created, creative works must be read or shared with a community in order to play a role in developing one's sense of personality, which would in turn support a right of dissemination.

Part III explores the insights this reconceptualization yields for a personhood-based theory of copyright, discussing how it recognizes a broader range of ways that creativity develops personality, takes into account the interests of follow-on authors, and provides an affirmative theory of the public domain. It also examines the limitations implicit in the theory, discussing its emphasis on noncommercial and educational activity and providing for limits to any associated rights of dissemination.

I. HEGEL AND KANT ON PERSONHOOD AND COPYRIGHT

According to the conventional wisdom, personhood-based theories of copyright are founded on the philosophical writings of Kant and Hegel.[14] Indeed, much of the academic commentary invokes both scholars' work in parallel without differentiating between them.[15] The decision to lump these thinkers together is somewhat curious in that Kant and Hegel are thought to embody distinct intellectual traditions. Kant is regarded as epitomizing the *monist* perspective that dominates German law, in which all authorial interests are vested in a single right. Hegel is regarded as the font of the *dualist* perspective followed in France, which creates two distinct rights so that authors' economic and personal interests can receive separate protection.[16]

Even more problematic are the differences that property plays in terms of developing every individual's sense of self. Hegel regarded property as an essential attribute of personality,

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[14] For the seminal statement basing personhood theory in Kant and Hegel, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982). Radin suggested that personhood theory might apply to intellectual property. *Id.* at 1013 n.202. As the citations in *supra* notes 1 and 3 and *infra* notes 15, 16, and 42 indicate, the copyright literature now widely presumes that personhood theory is based on Kant and Hegel.

[15] *See, e.g.*, Thomas F. Cotter, *Pragmatism, Economics, and Moral Rights*, 76 N.C. L. REV. 1, 7–10 (1997); Lacey, *supra* note 2, at 1541; Rigamonti, *supra* note 6, at 68.

[16] *See, e.g.*, Damich, *supra* note 3, at 30; Netanel, *supra* note 3, at 378–81.

whereas property did not play so nearly a central a role for Kant. Importantly, Hegelian theory does not value property because it reflects the imprint of the personality of the owner, but rather because it reflects the recognition by others of something that distinctively belongs to the owner. In other words, property matters not because of the relationship between the owner and the thing owned, but rather because it defines interpersonal relationships in ways that reify the self.

Equally curious is the fact that the conventional wisdom largely overlooks the fact that both Kant and Hegel specifically laid out their views about the unauthorized copying of books.[17] A close reading of these writings reveals a much more limited vision of copyright that accords a lesser degree of protection to nonliterary and derivative works, conclusions that cannot be squared with the author-centered vision of personhood theory that gives authors a wide degree of control over their works.

This Part will explore each of these themes in turn, considering Kant's and Hegel's general theories of property and their specific writings about copyright. The net result is that neither thinker can be properly be regarded as providing support for the conventional wisdom about personhood theories of copyright or the type of protection traditionally associated with the European tradition of moral rights.

A. Kant

Proceeding chronologically, my analysis begins with Kant, focusing on his essay, *On the Wrongfulness of Unauthorized Publication of Books*,[18] and his brief, two-page discussion of "What Is a Book?" in *The Metaphysics of Morals.*[19] These works receive relatively little

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[17] *See* HEGEL, *supra* note 9, ¶¶ 4–69; KANT, *supra* note 9; Kant, *supra* note 9.
[18] Kant, *supra* note 9, at 32.
[19] KANT, *supra* note 9, at 106–07.

attention, with the former subsisting in "relative obscurity"[20] and the latter being omitted from many editions of the book.[21] As a result, Kant is often cited, but rarely analyzed in depth.[22] The paucity of close attention has permitted misperceptions to persist about the extent to which his work supports the conventional wisdom.

1. The Relationship Between Creative Works and Personhood

Perhaps the central tenet of Kant's work is that all individuals be treated as ends unto themselves, rather than as instrumental means toward realizing some other goal. As expressed by Kant: "A person is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a *dignity* by which he exacts respect for himself from all other rational beings in the world."[23]

Consistent with this view, Kant distinguished between subjects/people on the one hand and objects/things on the other. The defining characteristic of persons is that they are capable of exercising free will and having actions imputed to them morally.[24] Things, in contrast, are inherently "void of freedom" and are instead the "object[s] of the free activity of the Will."[25] Only aspects that fall on the object side of the dichotomy can properly be regarded as property,

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[20] Anne Barron, *Kant, Copyright and Communicative Freedom*, 31 LAW & PHIL. 1, 9 (2012).

[21] David Saunders, *Approaches to the Historical Relations of the Legal and the Aesthetic*, 23 NEW LITERARY HIST. 505, 520 n.4 (1992).

[22] Analyses of Kant's implications for copyright typically consist of brief discussions appearing in larger works. *See, e.g.*, PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 80–81 (1996); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 289–90 (1970); Tom G. Palmer, *Are Patents and Copyrights Morally Justified?: The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 839–41 (1990); Netanel, *supra* note 3, at 374–77. Article-length discussions are relatively few. *See* Barron, *supra* note 20; Saunders, *supra* note 21; Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059 (2008).

[23] IMMANUEL KANT, THE METAPHYSICS OF MORALS 230 (Mary Gregor ed. & trans., Cambridge Univ. Press 1991) (1797).

[24] IMMANUEL KANT, THE PHILOSOPHY OF LAW 31 (photo. reprint 1974) (W. Hastie trans., Edinburgh, T. & T. Clark 1887) (first published in 1796).

[25] *Id*. at 32.

because treating any aspect that falls on the subject side of the divide as property would violate the principle that every person be treated as an end and not a means.[26]

As an initial matter, Kant conceives of the person as an abstract holder of rights, devoid of individual preferences, abilities, and history. As a general matter, it is unclear how such an abstract and universal conception of personhood can serve as a repository for the individual differences that are generally thought to constitute personality.[27] Moreover, such abstract rational agents bear no necessary connection to property.[28] Kant does recognize that individuals can hold legal ownership interests in external things.[29] But the reason is not because those things are embodiments of individual personality. Instead, Kant argues that failing to permit property interests would violate his "Principle of Right" by denying a person the use of a thing even when such use would not abrogate with the freedom of others.[30]

In other words, Kant respects property because of the coherentist, rationalist vision implicit in his famous categorical imperative rather than its role in constituting personality. On the contrary, to the extent that anything is the embodiment of a person's will, it falls on the subject side of the subject-object dichotomy and cannot be treated as property. If taken to an

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[26] Kant writes elsewhere:

> Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person *cannot* be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.

IMMANUEL KANT, LECTURES ON ETHICS 165 (Louis Infield trans. 1930).

[27] Radin, *supra* note 14, at 962.

[28] *Id.* at 967.

[29] KANT, *supra* note 24, at 61–62.

[30] *Id.* at 62–63. For Kant's definition of his Principle of Right, see *id.* at 46.

extreme, Kant's theories would seem to contradict the conventional wisdom about personhood theory, as any aspects that reflect personhood cannot be treated as property.[31]

Such a simplistic view would prove too much as it would bar any publication of creative works. A closer reading of Kant reveals a relationship that is more complex. Although authors' right to control the expression of their ideas to the public is inalienable, they can contract with publishers to have them speak to the public for them.[32] In so doing, publishers serve simply as "the mute instrument for delivering the author's speech to the public" and lack any authority to hold back or modify the author's speech,[33] even if the author dies before the work is published.[34]

This refinement solves the conundrum of how authors can contract with another party to publish their works without surrendering those aspects of the work that embody their will. Kant also uses it to make clear that those who copy books without authorization infringe upon the rights of publishers, not authors.[35] Most importantly for our purposes, because the rights at issue rest with publishers, enforcement of those rights cannot be construed as protecting the interests of authors.[36]

2. The Lack of Protection for Nonliterary and Derivative Works

Other aspects of Kant's essay raise further doubts as to whether his work can serve as the foundation for a personhood-based theory of copyright that gives strong protection to creative works because they are imbued with the personalities of their creators. For example, Kant concludes that owners of works of art are free to make copies of them and sell them in their own

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[31] Treiger-Bar-Am, *supra* note 22, at 1072–75.

[32] In so doing, Kant, distinguished between the speech directed to the public (called the *opera*), which remained in the control of the author, and the physical embodiment of the work (called the *opus*), which was subject to the control of the publisher. KANT, *supra* note 9, at 106; Kant, *supra* note 9, at 30, 32.

[33] Kant, *supra* note 9, at 30 (emphasis omitted).

[34] *Id.* at 33–34.

[35] KANT, *supra* note 9, at 107; Kant, *supra* note 9, at 31.

[36] Saunders, *supra* note 21, at 507.

name, presumably because nonliterary works lack the separation between the physical embodiment of the work and the ideas contained within it.[37] Absent some claim that sculptures and paintings contain less of their creators' personalities than do literary works, it becomes impossible to reconcile Kant's rationale for opposing unauthorized copying with the traditional vision of personhood-based justifications for copyright.[38]

Equally tellingly, Kant refused to include derivative works within his justification for prohibiting unauthorized copying. Kant concludes that "if someone so alters another's book (abridges it, adds to it, or revises it) that it would even be a wrong to pass it off any longer in the name of the author of the original, then the revision in the editor's own name is not unauthorized publication and therefore not impermissible."[39] When that occurs, the work is sufficiently changed that the follow-on author does not interfere with the initial author's speech to the public, and the publisher does not hold itself out as speaking for the initial author.[40] Similarly, Kant concluded that "translation into a foreign language cannot be taken as unauthorized publication; for it is not the same speech of the author, even though the thoughts might be precisely the same."[41]

The manner in which Kant perceived the prelateship between creative expression and personality make it hard for his work to serve as the foundation of the conventional understanding of personhood-based theories of copyright that would protect creative works because they embody their creators' personality. Moreover, even though Kant is often cited as

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[37] Kant, *supra* note 9, at 34. In other words, for works of art, the *opera* cannot exist independently of the *opus* in which it is embodied. *Id.*

[38] As such, Kant's position represents the precise opposite of U.S. law, which accords a degree of moral rights protection to sculpture and paintings under the Visual Artists Rights Act without extending any personality-based protection to literary works.

[39] Kant, *supra* note 9, at 35.

[40] *Id.* For a similar observation, see Treiger-Bar-Am, *supra* note 22, at 1080–82.

[41] Kant, *supra* note 9, at 35.

the intellectual foundation for moral rights, such reliance is undercut by his willingness to place nonliterary and derivative works outside the scope of copyright protection.

B. Hegel

The other philosopher typically cited as providing a foundation for the conventional wisdom about personality theory is Hegel.[42] Unlike Kant, Hegel did regard property as playing a central role in defining every person's distinct personality.[43] But as we shall see, Hegel valued property not because of the connection between the property and the owner, but rather because of how it defines and organizes relationships between the owner and other people. Like Kant, moreover, Hegel recognized only limited copyright protection over nonliterary and derivative works.

1. The Relationship Between Creative Works and Personhood

The fact that Hegel regarded property as playing an essential function in defining a person's personality offers considerable promise as a basis for a personhood-based theory of copyright. Unfortunately, any such argument would be based on a fundamental misunderstanding of Hegel's view of the relationship between property and personality. Property is important to Hegel not because of the relationship between the property and the individual, but rather because of how the institution of property defines each individual's relationship with other individuals.

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[42] A number of excellent analyses applying Hegel to copyright exist. For the leading early analyses, see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330–54 (1988); Palmer, *supra* note 22, at 837–38, 841; Netanel, *supra* note 3, at 360–61; Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1239–44 (1996). The subject has attracted renewed interest in recent years. *See* Wenwei Guan, *The Poverty of Intellectual Property Philosophy*, 38 HONG KONG L.J. 359 (2008); Karla M. O'Regan, *Downloading Personhood: A Hegelian Theory of Copyright Law*, 7 CAN. J.L. & TECH. 1 (2009); Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453 (2006).

[43] *Id.* ¶ 51.

Like Kant, the starting point for Hegel's analysis is human will, which he regarded as the core of human existence and as essentially free and unconstrained.[44] In short, it is "the unrestricted infinity of absolute abstraction or universality, the pure thought of oneself."[45] The problem is that while the will is universal and self-conscious, it otherwise lacks content.[46] For the ego to develop, it must "transition from undifferentiated indeterminacy to the differentiation, determination, and positing of a determinacy as a content and object."[47] It is "[t]hrough this positing of itself as something determinate" that "the ego steps in principle into determinate existence."[48]

The first step in this process manifests itself as *personality*, in which the will recognizes that it is bounded by the person's own preferences and external limitations. But at the same time, personality remains a "wholly abstract determination of the absolute and infinite will."[49] Personality remains aware that the will is essentially self-relational and retains a "consciousness of [it]self as a completely abstract ego."[50] The presence of external constraints thus does not prevent persons from "know[ing] [them]sel[ves] as something infinite, universal, and free."[51]

It is by "claim[ing] that external world as its own" that the personality rises above being only subjective and abstract and becomes reified.[52] Indeed, it is the presence of a "sphere distinct from the person" that is "different and separable" from the purely subjective

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44 HEGEL, *supra* note 9, ¶ 4; *id.* ¶ 5 (arguing that free will contains "the element of pure indeterminacy or that pure reflection of the ego into itself which involves the dissipation of every restriction . . . either immediately presented by nature, by needs, desires, and impulses, or given and determined by any means whatever").

45 *Id.* ¶ 5.

46 *Id.*¶ 35.

47 *Id.* ¶ 6.

48 *Id.*

49 *Id.* ¶ 41.

50 *Id.* ¶ 35.

51 *Id.* ¶ 35.

52 *Id.* ¶ 39.

consciousness of personality that allows the person to become something immediate.[53] Thus, in order to become determinate instead of merely abstract, "[a] person must translate his freedom into an external sphere in order to exist as an Idea."[54] The way that recognizing these limits allows individuals to rise above them is epitomized by Hegel's statement, "in chains, I can still be free."[55]

The primary way that a person embodies himself in the external world is by "putting his will into any and every thing and thereby making it his."[56] Hegel called this "the absolute right of appropriation which man has over all 'things.'"[57] Because exerting dominion over things is the essential way that the will manifests itself in the external world, Hegel called property "the *embodiment* of personality."[58] More specifically, these objects "constitute my own private personality and the universal essence of my self-consciousness" and "are my personality as such, my universal freedom of will, my ethical life, my religion."[59]

Under the Hegelian view of personality, property thus plays a central role in defining a person as a person. Only by establishing a property interest in external objects can the will achieve a concrete existence. Hegel clearly envisioned this as encompassing not just chattels, but also "[m]ental aptitudes, erudition, artistic skill, even things ecclesiastical, inventions, and so forth."[60] He recognized that [i]t may be asked whether the artist, scholar, &c., is from the legal point of view in possession of his art, erudition, ability to preach a sermon, sing a mass, & c., that is, whether such attainments are 'things,'" because "while possession of these may be the

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53 *Id.* ¶ 41.
54 *Id.* ¶ 41.
55 *Id.* ¶ 48.
56 *Id.* ¶ 44.
57 *Id.*
58 *Id.* ¶ 51.
59 *Id.* ¶ 66.
60 *Id.* ¶ 43.

subject of business dealings and contracts, as if they were things, there is also something inward and mental about it."[61]

Like Kant, Hegel resolves this conundrum by distinguishing between the ideas contained in the work and the physical work itself. On the one hand, "[a]ttainmments, erudition, talents, and so forth, are, of course, owned by free mind and something internal and not external to it."[62] At the same time, "by expressing them it may embody them in something external and alienate them."[63]

Copyright is "concerned with mental aptitudes, erudition, &c., only in so far as they are possessions in the legal sense."[64] "[I]t is not until we come to deal with alienation that we need begin to speak of the *transition* of such mental property into the external world where it falls under the category of property in the legal sense."[65] He reasons, "What is peculiarly mine is a product of my mind may, owing to the method whereby it is expressed, turn at once into something external like a 'thing' which *eo ipso* may then be produced by other people."[66] Alienating the physical embodiment of these ideas gives others the right to the ideas contained therein.[67] But it does not convey the right to make copies. Instead, the owner of a copy of such a thing is only in possession of "that copy *qua* a single thing."[68] The author "remains the owner of

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61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.* ¶ 68.
67 *Id.* ("by taking possession of a thing of this kind, its new owner may make his own the thoughts communicated in it or the mechanical invention which it contains, and it is ability to do this which sometimes (i.e. in the case of books) constitutes the value of these things and the only purpose of possessing them. But besides this, the new owner at the same time comes into possession of the universal methods of so expressing himself and producing numerous other things of the same sort.").
68 *Id.* ¶ 69.

the *universal* ways and means of multiplying such books and machines, &c.," which the author "may reserve . . . to himself as means of expression which belong to him."[69]

Property is thus important to Hegel for the way that it reifies the personality. But it does so not by establishing a special bond between a person and an external object. Instead, the purpose of property is to define a person's relationship vis-à-vis the external world and other individuals so as not to remain merely abstract. In other words, property develops personality not by defining a person's relationship with an object, but rather by structuring their relationships with other people.[70]

This explains one aspect of Hegel's theory of property that some have found puzzling,[71] which is how Hegel could regard property as essential to defining personality while simultaneously regarding alienation of that property as one of the ways that persons can manifest their will over particular objects.[72] The reason is that alienation necessarily contains the recognition by others that the property being alienated belongs to the person transferring the property. Again, the intersubjective recognition by others of the person's property rights over the object is what matters, not the relationship with the object itself.

Hegelian property theory thus does not provide a firm foundation for the traditional personhood-based conception of copyright law. Although property plays a fundamental role in defining personality under Hegel's theory, it does so by mediating relationships with other people, not by establishing particularly strong relationships with the property itself.

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69 *Id.*
70 Schroeder, *supra* note 42, at 457, 461–62.
71 Hughes, *supra* note 42, at. 345.
72 HEGEL, *supra* note 9, ¶¶ 52–53.

2. The Lack of Protection for Nonliterary and Derivative Works

Valuing property for reflecting an intersubjective recognition between people of each other's sovereignty does make property an essential aspect of personhood. That said, it provides little guidance as to what property interests should be recognized. For Hegel, it is enough that others recognize that a person possesses *some* property right. Emphasizing that others must recognize another person's property interest says nothing about what the scope of the property interests should be.[73]

Thus, any insight into Hegel's view of the scope of copyright must derive from his specific writings about the alienability of the products of individual intellect. On these topics, he is far more equivocal than the position reflected in the conventional wisdom about personhood and copyright.

Consider, for example, Hegel's views about the limited protectability of physical works of art. Because they require "the portrayal of thought in an external medium," they are necessarily "so peculiarly the property of the individual artist that a copy of a work of art is essentially a product of the copyist's own mental and technical ability."[74] Thus any copies made necessarily embody the will of the follow-on artist rather than the original artist. This stands in stark contrast to literary works, which can be copied through mere mechanical reproduction that lacks any input from the copyist.[75] Hegel regarded works of art and literary works as representing opposite ends of a spectrum, with works falling in between the poles being

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[73] *See* Schroeder, *supra* note 42, at 476–78; Sterk, *supra* note 42, at 1239.
[74] HEGEL, *supra* note 9, ¶ 68.
[75] *Id.*

"transitional stages to which a greater or less degree partake of the character of one or other of the extremes."[76]

Hegel adopted a similar position to derivative works made from literary works. Intellectual works are made to be read by others; indeed, "the destiny of a product of the intellect is to be apprehended by other individuals and appropriated by their representational thinking, memory, thought, etc."[77] As those who learn from these works to make works of their own, follow-on authors inject their own contribution, giving those work "some distinctive form, so that [authors of the follow-on work] can regard the resources which flow from it as their property, and may assert their right to reproduce it."[78]

The problem was that the extent to which the new form given a derivative work becomes more important than the contribution of the initial author "cannot be precisely determined."[79] Although copyright laws attempt to demarcate this boundary, "[t]he ease with which we may deliberately change something in the form of what we are expounding or invent a trivial modification in a large body of knowledge or a comprehensive theory which is another's work, and the impossibility of sticking to the author's words in expounding something we have learnt, all lead themselves . . . to an endless simplicity of alterations which more or less superficially stamp someone else's property as our own."[80] Hegel was particularly critical of anthologies that add nothing of real value "and yet may be claimed as something peculiar the writer's own."[81]

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76 *Id.*
77 *Id.* ¶ 69.
78 *Id.*
79 *Id.*
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81 *Id.* ¶ 69.

"The result of this may easily be that the profit promised to the author work or his original idea becomes negligible or reduced for both parties or lost to all concerned."[82]

Hegel's frustration over where to draw this line eloquently demonstrates his theory's inability to provide insight into the proper scope of copyright protection. Many functions, such as education, require "the repetition of well-established thoughts." Hegel asked "to what extent does the new form which turns up when something is expressed again and again transform the available stock of knowledge, and in particular the thoughts of others who still retain *external* property in those intellectual reproductions of theirs, into a private mental property of the individual reproducer and thereby give him (or fail to give him) the right to make them his *external* property as well?"[83] Or, on the other hand, "To what extent is such repetition of another's material in one's book a plagiarism?"[84] Simply put, "there is no precise principle of determination available to answer these questions, and therefore they cannot be finally settled either in principle or by positive legislation."[85] Instead, Hegel concluded that the honor system provided the only viable protections against plagiarism.[86]

The foregoing discussion illustrates the problems with the simplistic interpretation of Hegelian theory that supposedly gives copyright protection to creative works because they are extensions of the author's personhood. Such a theory is inconsistent not only with the logic of Hegel's philosophy. It contradicts Hegel's explicit writings on copyright, which explicitly refuse to accord copyright protection to physical works of art and recognize that derivative literary works may sufficiently reflect the will of follow-on authors to justify regarding it as their

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82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*

property. This is a far cry from the traditional interpretation of Hegel typically associated with moral rights regimes, which focuses solely on the interests of initial authors, giving them rights that are so strong as to be inalienable.

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In short, neither Kant nor Hegel offer a sound basis for a vision of copyright and personhood that regards creative works as the embodiment of their creators' personalities and places the highest priority on protecting those interests. Properly read, neither thinker's writings support the idea that having a closer personal connection with a work is a necessary aspect of personality. Moreover, both Kant's and Hegel's specific writings about copyright provide much more nuanced positions that recognize that the interests of initial authors must be balanced against the contributions made by follow-on authors. The works of Kant and Hegel thus cannot support the conventional wisdom about personhood theory that would protect creative works because they are extensions of their authors' personality.

II. TOWARD A BROADER CONCEPTION OF PERSONHOOD AND CREATIVE WORKS

The conventional wisdom applying personhood theory to copyright suffers from more than just inconsistency with its putative philosophical foundations. In focusing narrowly on the extent to which a finished work of art embodies its creator's personality, this approach ignores the other ways that creative works can contribute to given person's sense of self. Most importantly, creative works are important not just as artifacts that are extensions of the will of their creators. Examining German aesthetic theory rather than property theory makes clear that the heuristic experience of engaging with creative works can also promote personality. This insight is perhaps best embodied in the German aesthetic concept of play (*spiel*), which, in the classic German dualist tradition, serves to unify the conflict between a person's rational and

sensual impulses.[87] Although Kant's and Schiller's vision of play involved passive contemplation of creative works, later psychologists, aesthetic scholars, and philosophers explored how creating works can play an essential role in promoting self-actualization.

Recognizing the importance of engaging in creative activity does not by itself determine the proper scope of copyright protection. Indeed, if creativity were the sole product of the author's imagination, each person could simply pursue their own self-actualization without needing any extrinsic resources. To the extent that creative works are adaptations from the extant corpus of creative works, personhood theories arguably support structural copyright law to give individuals sufficient access to prior works to achieve self-actualization. Moreover, to the extent that such works must be read by others or be shared with a community in order to be meaningful, this theory arguably supports a right of dissemination.

A. Creativity and Self-Actualization

The fonts of modern theories of how creativity can develop personality are the work of Kant and Schiller.[88] Although many developmental psychologists focus on the consequentialist aspects of play, such as a release of excess energy,[89] a safety value for discharging pent-up emotions,[90] or the practice of behaviors that will become useful later in life,[91] the German tradition values play for its ability to allow each person to develop her own sense of self rather than for its ability to promote other more consequentialist values.

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[87] For an early work that hinted at this idea without developing it, see David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Most-Literate Millennium*, LAW & CONTEMP. PROBS., Spr. 1992, at 139.

[88] MIHAI SPARIOSU, DIONYSUS REBORN: PLAY AND THE AESTHETIC DIMENSION IN MODERN PHILOSOPHICAL AND SCIENTIFIC DISCOURSE (1989).

[89] Herbert Spencer.

[90] *See* Konrad Lange, *Illusion in Play and Art*, *in* A MODERN BOOK OF ESTHETICS 5 (Melvin Rader ed., 3d ed. 1960).

[91] *See* KARL GROOS, THE PLAY OF MEN (1908).

1. Kant

The seminal modern statement of how creative works can contribute to human self-actualization appears in the first part of Immanuel Kant's *Critique of Judgment* in a section entitled the "Analytic of the Beautiful."[92] According to Kant, humans experience the "feeling of life," described as the pleasurable experience of being endowed with and exercising a freedom that transcends the world and everything in it, only when they are in a "state of free play" completely free from any restraining concepts.[93] Human beings engage in free play when they make "judgments of beauty."[94] Beauty is not an inherent characteristic of an object, such as a statement about its shape or its color, which may not evoke any feelings of pleasure at all. Instead, judgments of beauty necessarily represent a person's visceral reactions to the object.[95]

In addition, judgments of beauty are distinct from statements of preference, which reflect the speaker's appetites and interests. Although such statements also refer to subjective experiences of pleasure produced by objects, expressing a desire for consumption or appropriation of an object reflects what Kant calls an "interest" in the object. Having an interest in an object makes a person dependent on it.[96] This need draws the person along in a way that makes that person not completely free. It is only when a person's "wants" have been "appeased" that such a statement constitutes a true judgment of beauty.[97]

Judgments of beauty are also distinct from judgments of moral duty, such as the classic Kantian categorical imperative. Kant writes, "Where the moral law speaks, there is no longer,

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[92] KANT, *supra* note 9, 45. The discussion that follows draws on Anthony Kronman, *Is Poetry Undemocratic?*, 16 GA. ST. L. REV. 311, 318–26 (1999).
[93] KANT, *supra* note 9, at 46.
[94] *Id.* at 199.
[95] *Id.* at 56.
[96] *Id.* at 43.
[97] *Id.* at 44.

objectively, a free choice as regards what is to be done."[98] Only judgments that are exercised independently of reason and desires produce the pleasure associated with judgments of beauty. Indeed, judgments of beauty are inherently not rule-bound, since there is no rule about what is beautiful and what is not. Thus Kant concludes that art is "genuine only if it is autonomous."[99]

Instead, judgments of beauty reflect an "entirely disinterested satisfaction" that is a feeling of wholeness and integrity that is fully gratified merely by observing the object.[100] It is only when people are unconstrained by wants or rules that their cognitive faculties are in a "state of *free play*,"[101] which Kant describes as "purposiveness without purpose."[102] Indeed, conceived in this manner, aesthetic pleasure is the pleasure of freedom itself.

Although judgments of beauty are inherently subjective, the fact that they are disinterested and independent of individual preferences creates the potential for those judgments to be shared by others as well. Kant regarded judgments of beauty as invitations to others to recognize this same pleasurable power in themselves.[103] Indeed, every judgment of beauty contains an aspiration toward universality that is missing from mere statements of preference or personal taste, carrying with it the expectation that others can and ought to share that judgment.[104] Sharing a judgment of beauty that has the potential to be universally communicable with others who possess the same ability to experience this freedom for themselves creates a shared experience that goes beyond two people reaching the same conclusion after conducting

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98 *Id.* at 45.
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100 *Id.* at 56.
101 *Id.* at 52.
102 *Id.* at 68.
103 Kronman, *supra* note 92, at 326.
104 KANT, *supra* note 9, at 59.

the same scientific experiment. The anticipated pleasure of being in the company of one's equals an in communication with them gives rise to the pleasure that Kant calls "sociability."[105]

2. Schiller

Kant's work prompted a response from Schiller. Best known as the second leading figure of German literature (behind only Goethe), Schiller has long been overlooked as an aesthetic theorist. His early work directly challenged Kant's subjective vision of aesthetic taste, laying out a theory of art "based on principles."[106] Schiller defined beauty as the result of harmony between opposing forces: the physical and the moral, duty and inclination. He described this harmony as the *Schöne seele* ("beautiful soul"), which is the human product of the synthesis or harmony of opposing drives reconciled through a process of aesthetic education.[107]

In his *Aesthetic Letters*, Schiller focuses explicitly on the concept of play as the means for reconciling these conflicting drives. In explaining his theory of aesthetics as the path to freedom, Schiller discusses the primary elements of human experience as "impulses" (*triebe*).[108] The form impulse (*formtrieb*) reflects the tendency of the mind toward rational explanations and structure, while the material or sensual impulse (*stofftrieb*) looks to concrete facts for its explanations of the world around it.[109]

The play impulse (*spieltrieb*) is the aesthetic drive that brings together these opposing drives and holds them in tension.[110] The ultimate form of play, he states, is in contemplating the beautiful, the process described above through which the viewer can temporarily engage both

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105 *Id.* at 139.
106 FRIEDRICH SCHILLER, ON THE AESTHETIC EDUCATION OF MAN IN A SERIES OF LETTERS, letter 26 (Reginald Snell trans., 1954) (1793).
107 *Id.* letter 12.
108 *Id.*
109 *Id.*
110 *Id.* letter 15.

drives at once, allowing moral and physical constraints to cancel each other out in a way that sets the psyche free.[111] Thus, for Schiller, the ability to play is representative of freedom. Indeed, "man . . . is only fully a human being when he plays."[112] Rather than degrading beauty to a mere frivolity, the term "play" is intended to connote liberation.

Together, Kant and Schiller emphasized the importance of the idea of play in the human experience. Under this conception, play is undertaken for its own sake, which stands in stark contrast to the consequentalist visions of play that view play as an outlet for excess or compensation for deficient energy, practice for adult life, a mechanism for the assimilation of information, or some other instrumental purpose.[113] Instead, play develops the sense of self directly and is valued for itself.

B. Toward a More Active Vision of Creativity

What is particularly striking about Kant's and Schiller's views is the passiveness of their vision of play. Under this conception, play involved the appreciation of great works of art that could only be created by great masters. This so-called Romantic vision of authorship does not recognize any value to individuals' efforts to author creative works on their own, a position criticized for its attempt to justify privileging the positions of authors.[114]

Later theorists would develop more active visions of play. Most important for our purposes are the psychologists, aesthetic theorists, and philosophers who have explored the deep

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[111] *Id.*

[112] *Id.*

[113] For a survey, see Dorothy W. Jackson & Henry R. Angelino, *Play as Learning*, 13 THEORY INTO PRACTICE: VALUE OF PLAY FOR LEARNING 317, 318–20 (1974).

[114] Indeed, a leading scholar has attributed this in large part to Schiller's desire for financial self-sufficiency and his frustration at Germany's failure to enact meaningful copyright protection. *See* MARTHA WOODMANSEE, AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 59 (1994) (discussing Schiller's desire to promote his own self-sufficiency by promoting German adoption of copyright law); Barron, *supra* note 20, at 26 (noting that "Kant's major concern in the 1785 Essay is in fact to legitimize the book trade . . . and the profits that may be realized from it").

connections between creating expressive works and the development of personality.

1. Psychology: Maslow, Rogers, and Self-Determination Theory

Psychology provides perhaps the strongest foundation for the important role that individual authorship of creative works can play in the development of personality. One prominent example is Abraham Maslow's celebrated study on the hierarchy of needs, which posited that humans are motivated by the drive to satisfy five basic needs.[115] Only after the more fundamental needs are satisfied can individuals seek to satisfy needs located higher in the hierarchy.[116] At the top of the hierarchy is the need for self-actualization, which "is not necessarily a creative urge although in people who have any capacities for creation it will take this form."[117]

Maslow initially spoke of creative expression as if it were the unique province of artistic people,[118] suggesting that in the case of artists the drive to create may be so strong that it is never satisfied.[119] He later emphasized that self-actualizing creativity was not limited to the artistic class by drawing a distinction between "special-talent creativeness" and "self-actualizing creativeness."[120] Instead, it was "a fundamental characteristic, inherent in human nature, a potentiality given to all or most human beings at birth."[121] He argued that cooks, hostesses,

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[115] Specifically, these needs are physiological, safety, love, esteem, and self-actualization. Abraham Maslow, *A Theory of Human Motivation*, 50 PSYCH. REV. 370 (1943). He developed it further in ABRAHAM MASLOW, MOTIVATION AND PERSONALITY 80–92 (1954).

[116] Maslow, *supra* note 115, at 394.

[117] *Id.* at 383.

[118] Maslow, *supra* note 115, at 382 ("A musician must make music, an artist must paint, a poet must write, if he is to be ultimately happy. What a man *can* be, he *must* be. This need we may call self-actualization.").

[119] *Id.* at 386 ("There are other, apparently innately creative people in whom the drive to creativeness seems to be more important than any other counter-determinant. Their creativeness might appear not as self-actualization released by basic satisfaction, but in spite of lack of basic satisfaction.").

[120] A.H. Maslow, *Creativity in Self-Actualizing People*, *in* CREATIVITY AND ITS CULTIVATION _, _ (Harold H. Anderson ed., 1959), *reprinted in* ABRAHAM MASLOW, TOWARD A PSYCHOLOGY OF BEING 135, 137 (2d ed. 1968); *and* ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY 158, 160 (3d ed. 1987).

[121] *Id.* a 137.

homemakers, social service workers, and clinical psychiatrists can all be creative in their own way and noted that "a first-rate soup is more creative than a second-rate painting, and that, generally, cooking or parenthood or making a home could be creative while poetry need not be."[122] He "learned to apply the word 'creative' . . . not only to products but also to people in a characterologicial way, and to activities, processes, and attitudes."[123] Indeed, self-actualizing creativeness "stresses first the personality rather than its achievements, considering these achievements to be epiphenomena emitted by the personality and therefore secondary to it."[124] Creative people "are all integrators, able to bring separates and even opposites together into unity."[125] The "inner integration of the person" is what permits creativeness to be "constructive, synthesizing, unifying, and integrative."[126] Indeed, "the creativity of [Maslow's] subjects seemed to be an epiphenomenon of their greater wholeness and integration."[127]

Maslow found creativity "hard to define because it is seems to be synonymous with health itself" and "almost synonymous with, or a *sine qua non* aspect of, or a defining characteristic of, essential humanness.[128] Although his later work adopted a similar tone,[129] it implied a more causal relationship between creativity and self-actualization, suggesting that creative expression should be part of any educational curriculum "not so much for turning out artists or art products, as for turning out better people," because the creative process plays a key role allowing people to "become full human beings" and to "move toward actualizing the

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122 *Id.* at 136.
123 *Id.* at 137.
124 *Id.* at 145.
125 *Id.* at 140.
126 *Id.*.
127 *Id.*at 141; *see also id.*at 144 (arguing for increased emphasis "on the role of integration (or self-consitency, unity, wholeness) in the theory of creativeness")..
128 *See id.* at 145.
129 Abraham H. Maslow, *The Creative Attitude*, 3 THE STRUCTURIST 4, 4 (1963) ("My feeling is that the concept of creativeness and the concept of a fully-human person seem to be coming closer and closer together, and may perhaps turn out to be the same thing.").

potentialities that they have."[130] Maslow further described how during "the inspirational phase of creative furore," the creative person "loses his past and his future" and becomes "utterly lost in the present."[131] When people create, they are "then *most* integrated, unified, all of a piece, one-pointed, totally organized in the service of the matter-at-hand."[132] "Creativeness is therefore systemic; i.e., a whole—or Gestalt—quality of the whole person"[133] that allows "the fusion of the person and his world."[134] It is at these moments when people are "most fully realizing themselves, most mature and evolved, most healthy, when, in a word, they are most fully human."[135]

Carl Rogers similarly regarded "man's tendency to actualize himself, to become his potentialities" as the primary motivation for creativity.[136] "It is this tendency which is the primary motivation for creativity as the organism forms new relationships to the environment in its endeavor more fully to be itself."[137] The motivation is intrinsic, not extrinsic. Although creativity may be socially beneficial, "the individual creates primarily because it is satisfying to him, because this behavior is felt to be self-actualizing."[138] Creativity is not the unique province of great works, applying equally to "creating new formings of one's personality in psychotherapy" as to "painting a picture, composing a symphony, devising new instruments of

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130 *Id.* at 4.
131 *Id.* at 6.
132 *Id.* at 9.
133 *Id.*
134 *Id.* at 10.
135 *Id.* at 6; *see also* A.H. Maslow, *Emotional Blocks to Creativity*, 14 J. INDIV. PSYCH. 51 (1958) (describing how creativity allows the fusion of people's primary processes, which are unconscious and unbounded) and their secondary processes, which are conscious, rational and more constrained, thereby achieving the unity that characterizes self-actualized people).
136 Carl R. Rogers, *Toward a Theory of Creativity*, 11 ETC.: REV. GEN. SEMANTICS 249, 251 (1954).
137 *Id.* at 252.
138 *Id.*

killing, developing a scientific theory, [or] discovering new procedures in human relationships."[139] In short, creativity is a capacity that exists in every individual.

Rogers expanded on these thoughts in his later work. Like Maslow's self-actualized person, Rogers views his ideal "fully functioning person" as a creative person "from whom creative products and creative living emerge."[140] In a later version of this article revised into a book chapter, he concluded that "a person who is involved in the directional process which I have termed 'the good life' is a creative person."[141] Rogers in turn defined the good life as "the process of movement in a direction which the human organism selects when it is inwardly free to move in any direction, and the general qualities of this selected direction appears to have a certain universality."[142]

These themes have found modern expression in the Self-Determination Theory (SDT) developed by Edward Deci and Richard Ryan[143] and extended to copyright by Terry Fisher.[144] SDT represents a modern version of theories that regard human behavior as motivated by the need to satisfy innate psychological needs rather than serving instrumental goals.[145] In particular, SDT posits that humans are motivated by the need to fulfill three psychological needs: competence, relatedness, and autonomy.[146]

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139 *Id.* at 250.

140 Carl R. Rogers, *The Concept of the Fully Functioning Person*, 1 PSYCHOTHERAPY: THEORY, RES. & PRAC. 17, 23 (1963), *reprinted in* CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY 183, 193 (1961). Maslow recognized the connection as well. A.H. Maslow, *A Holistic Approach to Creativity*, *in* CLIMATE FOR CREATIVITY: REPORT OF THE SEVENTH NATIONAL RESEARCH CONFERENCE ON CREATIVITY 287, 288 (Calvin W. Taylor ed., 1971)

141 ROGERS, supra note 140, at 193.

142 *Id.* at 187.

143 *See* Edward L. Deci & Richard M. Ryan, *The "What" and the "Why" of Goal Pursuits: Human Needs and Self-Determination of Behavior*, 11 PSYCH. INQ. 227 (2000).

144 William W. Fisher III, *The Implication for Law of User Innovation*, 94 MINN. L. REV. 1417, 1465 (2010).

145 Deci & Ryan, *supra* note 143, at 227, 231.

146 *Id.* at 228,

In focusing exclusively on psychological needs, SDT excludes behaviors motivated by physiological needs.[147] In addition, SDT focuses on intrinsically motivated activities, defined as "those that individuals find interesting and would do in the absence of operationally separable consequences,"[148] such as "[a] man who, in the evening, sits at the keyboard and begins to play a piece of music, may become lost in its beauty and experience great pleasure."[149] Deci and Ryan note that "intrinsic motivation is associated with better learning, performance, and well-being."[150] Promoting intrinsic motivation in turn encourages creativity,[151] whereas introduction of external motivations reduces both the sense of self determination and creativity.[152] Interestingly, Deci and Ryan argue that individuals can internalize extrinsic motivations in ways that are consistent with need satisfaction so that they in turn become part of their own intrinsic motivation.[153]

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Together these scholars view creativity as an innate attribute of fully self-actualized individuals. These people pursue creativity as an end unto itself. Those engaging in self-actualizing creativity become lost in the moment. Indeed, any extrinsic motivation destroys the self-actualizing quality of creativity. The focus is neither on the consequences of the art nor on the tangible output, but rather on how the process of creation itself develops the sense of self.[154]

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r[147] *Id.* at 229.
[148] *Id.* at 233.
[149] *Id.* at 230.
[150] *Id.* at 233.
[151] *Id.* at 258.
[152] *Id.* at 234.
[153] *Id.* at 235–39.
[154] *See, e.g.*, EDWARD L. MATTIL, THE SELF IN ART EDUCATION 1 (1972) (National Art Education Association Research Monograph #5) (citing Maslow and Rogers as the basis for theories connecting creativity and personality); Willet W. Ryder, *The Role of Art in Self-Actualization*, ART EDUC., Mar. 1987, at 22, 22, 24 (same).

2. Aesthetics and Education

Aesthetic theorists have similarly emphasized the role that creativity can play in developing each individual's sense of self. Aesthetician Eugene Kaelin writes that "[t]he ultimate value of aesthetic expressions" lay in "the discovery of my own personality: of those feelings (some of which are forced upon me by my environment) which correlate most clearly with my true self. The self, then, must be such as to be developed by expression."[155] R.G. Collingwood similarly notes that "an artist creates in order to get his feelings clear," which in turn induces clarity to her psychic conditions.[156]

The key role that creating works can play in personal development has led many scholars to argue that art should represent a fundamental component of every child's education.[157] Some believe artistic expression allows people to explore who they are and what makes them unique.[158] Others echo Schiller by arguing that creating art permits individuals to achieve unity of body and mind.[159] Still others contend that the release of emotion and ideas through creativity permits individuals to become more fully integrated and developed as human beings.[160] This school of thought emphasizes that the process of creation matters more than the product,[161] which has become a theme echoed by modern scholars.[162]

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155 EUGENE F. KAELIN, ART AND EXISTENCE: A PHENOMENOLOGICAL AESTHETIC 90 (1970).

156 R.G. COLLINGWOOD, THE PRINCIPLES OF ART (1958).

157 For an overview, see Ryder, *supra* note 154, at 22, 23–24.

158 *See* MATTIL, *supra* note 154, at 12–13; Frances K. Heussenstamm, *Humanizing Higher Education*, ART EDUC., Mar. 1971, at 17, 18.

159 *See* Kenneth R. Beittel, *The Teaching of Art in Relation to Body-Mind Integration and Self-Actualization in Art*, ART EDUC., Nov. 1979, at 18.

160 *See* Florence Cane, *Art in the Life of the Child*, *in* CREATIVE EXPRESSION (Gertrude Hartman & Ann Shumarer eds., 1926).

161 *See* Viktor Lowenfeld, Creative and Mental Growth (rev. ed. 1952).

162 *See* LAWRENCE LESSIG, MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 25, 27, 79 (2008).

3. Capabilities Theory: Sen and Nussbaum

Other copyright scholars see a justification for personhood-theory in the "capabilities theory" pioneered by economist Amartya Sen[163] and extended by philosopher Martha Nussbaum.[164] This approach places upon the state the obligation to provide every individual with the preconditions they need to flourish and to develop their faculties meaningfully.[165]

Although some scholars suggest that human dignity only applies to needs lower in Maslow's hierarchy and does not include copyright,[166] Nussbaum's catalog of the key aspects of the human condition includes "Senses, Imagination, and Thought," which encompasses being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth."[167] Legal scholars have built on the capabilities theory to argue that copyright should be shaped to ensure that people continue to have access to the resources they need in order to be creative.[168]

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Although these theories are diverse, they share the common perspective that personal involvement in originating creative works plays a critical role in developing a sense of self. In the process, it replaces the passive role envisioned by Kant and Schiller with a broader conception that appreciates that personality is determined as much by the process of creating

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[163] *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 288 (1999).

[164] *See* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 78 (2000); MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 70–76 (2006); Martha C. Nussbaum, *Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 6 (2006).

[165] *See* SEN, *supra* note 164, at 38–39, 288; Nussbaum, *supra* note 164, at 6.

[166] Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 45 (1989).

[167] NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 164, at 76–78. In her other writings, Nussbaum also includes "Play. Being able to laugh, to play, to enjoy recreational activities." MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 80 (2000).

[168] *See* Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151, 1159–62, 1190–98 (2007); Fisher, *supra* note 144, at 1466–76; Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. 257, 313–15, 323–30 (2006).

works as well as how the results of those creative processes are treated. Moreover, they suggest that the law would be best served by providing the conditions necessary to allow individuals to engage in such self-actualizing behavior.

C. The Cumulative Nature of Creativity

What would the obligation to enable individuals to develop their sense of self by engaging in creative activity entail? Courts and scholars have long recognized how creative works typically borrow from and extend the existing corpus of works. For example, Justice Story once noted:

> Virgil borrowed much from Homer, Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.[169]

Ralph Waldo Emerson similarly noted that "the debt is immense to past thought. None escapes it. The originals are not original. There is imitation, model, and suggestion, to the very archangels, if we knew their history."[170]

Copyright scholars have frequently noted the extent to which works borrow from prior works when making arguments to limit protection for derivative works.[171] In particular, a literature has developed critiquing the influence of the Romantic vision of authorship, which regards creativity as springing fully formed from the author's head.[172]

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[169] Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) (Story, J.).

[170] Ralph Waldo Emerson, *Quotation and Originality*, *in* 8 WORKS OF RALPH WALDO EMERSON _ (1909).

[171] *See, e.g.*, Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 218 (1983); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990).

[172] *See, e.g.*, James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 41 DUKE L.J. 455 (1991); Mark Rose, *The Author as Proprietor:* Donaldson v. Becket *and the*

A classic example of this line of scholarship is Jessica Litman's article on *The Public Domain*, which observed that "[a]ll works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else's works" and that "the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea."[173] She notes that such observations in previous scholarship were almost invariably offered in passing without any analysis. Indeed, Jessica Litman has called the insight "such a truism that it has long been a cliché, invoked but not examined."[174] She proffers a more detailed description of the mechanism through which authors draw on other works subconsciously.[175] Authors create works without distinguishing whether the inspiration resulted from new ideas, past experiences, or works they have read.[176] Instead, works are the result of their entire range of experiences filtered through a "combination of absorption, astigmatism, and amnesia."[177] Rather than being mere "parasitism," borrowing is "the essence of authorship."[178] It also provides a justification for ensuring that current authors have sufficient access to the preexisting corpus of works.[179] Although a literature has emerged challenging how much Romantic authorship has actually influenced U.S. copyright law,[180] these studies have not challenged the inherent cumulative nature of most (if not all) creative works.

Genealogy of Modern Authorship, 23 REPRESENTATIONS 51 (1988); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

173 Litman, *supra* note 12, at 966.

174 *Id.*

175 *Id.* at 1000–01.

176 *Id.* at 1010.

177 *Id.* at 1011.

178 *Id.* at 967.

179 *Id.* at 967, 1012.

180 *See* Lionel Bently, R. v. The Author*: From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1 (2008); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (book review).

Although Litman does not invoke the literature directly, Litman's theory finds intellectual support from post-structural critical theory, which responded to New Criticism's privileging of the work as a source of meaning by emphasizing the intertextual nature of all writings. For example, Northrop Frye admonished, "Poetry can only be made out of other poems; novels out of other novels."[181] Frye rejected the view that "imagines that a 'creative' poet sits down with a pencil and some blank paper and eventually produces a new poem in a special act of creation *ex nihilo*," noting that "[h]uman beings do not create in that way."[182] He critiqued the Romantic tendency "to think of the individual as ideally prior to his society."[183] Instead, all works are "born into an already existing order of words."[184] Each work of creativity can only be understood as part of a larger genre and the conventions surrounding that genre.[185]

Roland Barthes echoed the same themes when he argued that "a text does not consist of a line of words, releasing a single 'theological' meaning (the 'message' of the Author-God)."[186] Instead, "the text is a tissue of quotations drawn from the innumerable centers of culture . . . . [The writer's] only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any of them."[187] Harold Bloom similarly noted, "The more deeply and widely we read, the more we become aware that good poems, novels, and essays are webs of allusion, sometimes consciously and voluntarily so, but perhaps to a greater degree without design."[188]

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181 NORTHROP FRYE, ANATOMY OF CRITICISM: FOUR ESSAYS 96 (1957).
182 *Id.* at 95.
183 *Id.* at 95–96.
184 *Id.* at 96.
185 *Id.* at 94–95.
186 Roland Barthes, *The Death of the Author*, *in* IMAGE—MUSIC—TEXT 142, 146 (Stephen Heath trans. 1977) (1967).
187 *Id.*
188 Harold Bloom *in Plagiarism—A Symposium*, N.Y. TIMES LITERARY SUPP., Apr. 9, 1982, at 413.

Julia Kristeva notes that "any text is a mosaic of quotations; any text is the absorption and transformation of another."[189]

Like Litman, literary theorists regard the process by which current works build on the preexisting literary corpus as being unconscious.[190] Borrowing moves from the subconscious to the conscious in Lawrence Lessig's most recent book, *Remix*. Through a series of anecdotes, Lessig celebrates what he calls Read/Write (RW) culture, in which people do not just consume culture; they add to it "by creating and re-creating the culture around them."[191] In contrast, to the previous Read Only (RO) culture, in which "[a]rtists want their expression framed just as they intend it," RW culture "asks something more of the audience" in that "[i]t invites a response."[192] The more participatory culture surrounding RW culture creates a greater level of responsibility[193] and permits children to develop a higher degree of cultural literacy,[194] which Lessig equates to democratic literacy.[195] It has the added virtues of allowing kids to create their works within the context of a community and providing them with engaging subject matter to use as the building blocks for learning.[196]

Lessig further argues that "[r]emix is an essential act of RW creativity" and advocates preserving a right to quote or remix as a "critical expression of creative freedom" that should be

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189 Julia Kristeva, *Word, Dialogue, and Novel*, *in* DESIRE AND LANGUAGE 64, 66 (Leon S. Roudiez ed., Thomas Gora et al. trans., 1980). The preexisting corpus of works was not the only extrinsic source of interpretation under post-structural theory. The other contextual source was the values and perspective brought by the reader. *See infra* notes 212–214 and accompanying text.

190 *See* Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, *in* FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS 61, 75 (Karen Hellekson & Kristina Busse eds., 2006).

191 LESSIG, *supra* note 162, at 28.

192 *Id.* at 84, 85.

193 *Id.* at 86; *accord id.* at 22–27.

194 *Id.* at 80–81, 114.

195 *Id.* at 107.

196 *Id.* at 77–82

preserved.[197] Although the Internet and digital technologies have opened remix expression to the masses,[198] they have simultaneously given creators of the original works a greater ability to prevent would-be remixers form obtaining access to their works.[199] Although Lessig sees value in professional creativity,[200] he warns that the enhanced level of control culture threatens to stifle the benefits of participation and responsibility associated with amateur creativity.[201] To correct this balance, Lessig advocates adopting a hybrid approach that permits commercial and sharing cultures to coexist.[202] While he speaks in terms of balance, his policy recommendations[203] and the concluding pages of his book[204] indicate that his primary concern is ensuring that would-be remixers enjoy sufficient access to the raw material they need to create their works.

Fan fiction represents another prominent example of conscious borrowing from the existing corpus of works. Indeed, the intertextuality of fan fiction is not merely implicit. Instead, works of fan fiction consciously quote from a defined archive of works while simultaneously contributing back to it, claiming a specific relationship with that corpus and "pointedly locating themselves within the world."[205] Far from being protected by property interests, the world of fan fiction "allows, or even invites, writers to enter it, select specific items they find useful, make new artifacts using those found objects, and deposit the newly made work back into the source text's archive."[206] Indeed, the fact that an entire community is accessing

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197 *Id.* at 56.
198 *Id.* at 69, 82–83.
199 *Id.* at 98–105.
200 *Id.* at 84–85, 105–06, 291–92.
201 *Id.* at 86; *accord id.* at 22–27.
202 *Id.* at 225–249.
203 *Id.* at 253–73; *accord id.* at 109–14.
204 *Id.* at 293–94.
205 *See* Derecho, *supra* note 190, at 65; Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS., Spring 2007, at 135, 143.
206 Derecho, *supra* note 190, at 65.

the same preexisting corpus provides the common bond that holds the community of fan fiction writers together.[207]

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Together these theories provide a basis for arguing that individual self-actualization depends on having sufficient access to the preexisting corpus of works. Some argue that the cumulative nature of creativity may be an inevitable aspect of the human condition. Others contend that even if borrowing from prior works is not inevitable, it provides certain benefits that are worth promoting as a matter of policy. When combined with the arguments discussed in Parts A and B connecting creativity with the development of personality, both suggest that preventing follow-on authors from obtaining sufficient access to prior works can harm the development of individual personality. Support for this position does not depend on the extreme claim that no true works of independent creation exist. So long as derivative creativity remains an important source of self-actualization, the presence of examples of truly original inspiration would simply recalibrate the proper balance rather than eliminate all need for access to prior works.

D. The Need for an Audience

The cumulative nature of all creativity provides one insight into ways that a richer conception of the relationship between personhood and creativity can shape copyright doctrine. If authoring creative works is both essential to self-actualization and requires access to the preexisting corpus of works, one might construct a theory of copyright that limits initial authors' ability to prevent follow-on authors from creating derivative works.

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[207] Letter from Rebecca Tushnet, Org. of Transformative Works, to U.S. Copyright Office, Library of Cong. 7 (Feb. 2, 2009), *available at* http://www.copyright.gov/1201/2008/responses/organization-transformative-works-34.pdf.

Such an argument would not necessarily lead to the broad type of access to preexisting works that advocates imagine. Some self-sufficient authors create for themselves and do not care if their work ever finds an audience. Indeed, if the act of creation itself is what develops personality, the need for self-actualization would be completely satisfied by a personal use right that did not include any right of dissemination. If anything, the emphasis that the psychological and aesthetic theories discussed above place on disinterestedness, intrinsic motivation, and living in the moment mitigate against such a right to disseminate.

That said, the idea that people will find fulfillment from authoring works that will never be read seems strange. Indeed, scholars as early as Aristotle recognized that "the poets merely follow their public, writing as its wishes dictate."[208] One branch of literary theory suggests that authors inevitably internalize their expectations of their readers' likely responses to their work.

1. Internalizing the Audience's Expected Reaction

Studies of the importance of an audience are best developed by the field of literary theory. Understanding this literature requires an appreciation of the overarching arc of scholarship in the field. Much of modern literary theory is a reaction to the New Criticism school that arose in the 1920s and 1930s, which focused on the close reading of texts as formal objects, independent of historical context.[209] A subsequent school known as Structuralism was similarly formal, but instead of focusing on words, it focused on the larger structures of

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[208] ARISTOTLE, POETICS, *in* THE RHETORIC AND THE POETICS OF ARISTOTLE 219, 239 (W. Rhys Roberts & Ingram Bywater trans., Modern Library 1954) (originally published circa 350 B.C.); *see also* ARISTOTLE, RHETORIC, *in* THE RHETORIC AND THE POETICS OF ARISTOTLE, *supra*, at 54–56, 121–28 (emphasizing the importance of tailoring one's argument to the audience).

[209] *See, e.g.*, MONROE BEARDSLEY, AESTHETICS: PROBLEMS IN THE PHILOSOPHY OF CRITICISM (1958); ROGER FOWLER, LINGUISTIC CRITICISM (1986).

signification that gave different words different meanings.[210] These schools shared a formal orientation and a desire to make interpretation more objective and scientific.

Structuralism in turn gave way to the cluster of schools that fit under the collective banner of Poststructuralism, with Barthes serving as a key transitional figure. While different flavors of Poststructuralism vary, they are based on the recognition that the structure that gives words meaning is a socially determined, cultural concept that can only be understood by analyzing the context in which words are used.[211] This accords audiences an important role in determining the meaning of texts.[212] Many theorists argue that meaning is the joint product of authors and readers.[213] More extreme versions of Poststructuralism give almost total primacy to audiences.[214]

By focusing on the social meaning of speech, approaches that regard the interpretation of texts as the joint product of authors and audiences (or even the exclusive province of audiences) are directed externally rather than the more inward-focused concerns of self-development. But as Deci and Ryan noted, recursive processes often cause such external considerations to be internalized.[215] Consistent with this insight, one branch of reader-response theory recognizes how authors may anticipate and incorporate how readers are likely to receive their work. For example, Gerald Prince discusses the role of "narratees," the persons to whom authors are

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[210] The seminal work was FERDINAND DE SAUSSURE, WRITINGS IN GENERAL LINGUISTICS (Carol Sanders et al. trans., 2006).

[211] *See supra* note 211 and accompanying text.

[212] For a brief overview, see Peter J. Rabinowitz, *Reader-Response Theory and Criticism*, *in* THE JOHNS HOPKINS GUIDE TO LITERARY THEORY AND CRITICISM 606 (Michael Groden & Martin Kreiswirth eds., 1994).

[213] *See, e.g.*, Barthes, *supra* note 186.

[214] STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980). Note that not all reactions to structuralism focused on audiences. Other theorists advocated a return to focusing on authors' intensions. *See, e.g.*, E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION (1967); P.D. JUHL, INTERPRETATION: AN ESSAY IN THE PHILOSOPHY OF LITERARY CRITICISM (1981).

[215] *See supra* notes 153 and accompanying text.

addressing their work.[216] Indeed, Prince envisions the narratee as a character (sometimes present only implicitly)[217] who exists internal to the text, rather than a reader who is outside the text.[218]

Similarly, Wolfgang Iser discusses how authors write for an "implied reader."[219] Unlike intended readers, which reflect the author's aims, and hypothetical informed readers, whose qualities are socially determined, Iser's implied reader has predispositions entirely laid down by the text itself "independent of any outside reality."[220] In contrast to the insight that "literary texts take on their reality by being read," the implied reader is "a textual structure anticipating the presence of a recipient without necessarily defining him" that "prestructures the role to be assumed by each recipient."[221] Quite aside from any actual reader, the implied reader is a "role offered by the text" that provides a "a frame of reference within which individual responses to a text can be communicated to others," thereby "provid[ing] a link between all the historical and individual actualizations of the text and mak[ing] them accessible to analysis."[222] From this perspective, even gaps that remain for readers to fill are part of the strategy of the author and thus under his control.[223]

Prince's and Iser's vision of the role of audiences is more consistent with the internal impact (rather than the external social meaning) that is the focus of personhood-theory than is traditional reader-response theory. In essence, these audiences' roles in interpreting texts are internalized by the author and reified in the text.

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216 Gerald Prince, *Introduction to the Study of the Narratee*, 14 POÉTIQUE 177 (1973).

217 *Id.* at [18–19, 22–23].

218 *Id.* at [13] (concluding that indications of the nature of any particular narratee "whether explicit or indirect, should be interpreted on the basis of the text itself"); *see also* Rabinowitz, *supra* note 212, at 606.

219 WOLFGANG ISER, THE IMPLIED READER: PATTERNS IN COMMUNICATION IN PROSE FICTION FROM BUNYAN TO BECKETT (1974).

220 WOLFGANG ISER, THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE 34 (1978).

221 *Id.*

222 *Id.* at 36, 37–38.

223 Rabinowitz, *supra* note 212, at 606.

This vision does, however, beg an important question: is it enough for authors to internalize the role of the expected audience, or must the work actually be read in order for authorship to be self-actualizing? Prince's and Iser's focus on the external question of the interpretation of texts lead them not to offer an answer.

One possibility is that authors who are so self-directed that they write for themselves or who have completely internalized extrinsic motivations may not care if their work ever finds a real-world audience. If so, personhood theory would not imply any right of dissemination. Another possibility is suggested by game theory, specifically the way that equilibria can unravel.[224] Authors whose works are never read will find that the process of anticipating their audience's reaction was an entirely hypothetical exercise. If they only realize this after the fact, they will have already gained the benefits with respect to self-actualization. More discerning authors who understand the overarching structure may be able to anticipate that the law will prevent them from sharing their works with others. This realization may demotivate certain authors, which in turn may prevent them from realizing the self-actualizing benefits of authorship.

2. Valuing Community

Another justification for the right to dissemination is implicit in the importance of community associated with remix and fan fiction cultures. Although saying that new works tend to build on prior works can justify a right of access to existing corpus, to the extent that the process is internal to the author, it does not imply any right to share those works. Consider the remix culture, which Lessig embraces because of the manner in which it promotes responsibility,

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[224] For the classic work, see Reinhard Selten, *The Chain Store Paradox*, 9 THEORY & DECISION 127 (1978).

cultural literacy, and the democratization of content creation.[225] These values could arguably be satisfied by a personal use right that authorizes access to prior works for private purposes but forbids any publication of those works.

Lessig's argument invokes a second conceptual premise to support a right of dissemination: the value of creating content in a community in which members create for one another and help each other learn how create.[226] His success model is the anime subculture of Japan, in which children begin by making and sharing their own sketches with others and then are introduced to the larger subculture by an older child.[227] The result is that creators see themselves as participants in a self-supporting community.[228] Indeed, "the pleasures of production of transformative works are intrinsic to participating in a creative community rather than motivated by extrinsic financial rewards."[229]

Community plays an even more central role for fan fiction, whose participants define themselves by a shared interest in a common body of work.[230] Many discussions of fan fiction emphasize the distribution of authorship and the centrality of a community of interpreters, who are also authors.[231] Other members of the community provide feedback that helps new authors improve, with the shared desire for additional commentary on the common source material serving as the glue that holds the community together.[232] Engagement with this larger

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[225] *See* LESSIG, *supra* note 162, at 80–81, 86–88, 107, 114.
[226] *Id.* at 77.
[227] *Id.* at 79.
[228] *Id.* at 80.
[229] Mizuko Ito, *The Rewards of Non-Commercial Production: Distinctions and Status in the Anime Music Video Scene*, FIRST MONDAY, May 3, 2010, at 4, http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2968/2528.
[230] Tushnet, *supra* note 207, at 7.
[231] *See* Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 NOTRE DAME L. REV. 2133, 2140 (2011).
[232] Tushnet, *supra* note 207, at 7; Tushnet, *supra* note 205, at 143 n.32 (discussing the value that fan fiction authors place on the "centrality of a community of interpreters" connected through "immediate feedback, constant discussions of underlying canon, and self-identification as members of a fandom based on particular source texts");

community is particularly important for younger authors, who learn from engaging with other members.[233] While many creators regard creating fan fiction "as an end in itself, and may only share their videos with a few close friends," many create in order to obtain recognition and status that can only achieved through approbation by a community characterized by an elaborate subculture that is quite hierarchical and stratified and governed by a core group of elites.[234]

The presence of community makes the dynamics surrounding fan fiction somewhat complex. Although peer production is often lauded for its democratic qualities and accessibility to everyone,[235] like all social practices, every community of peer production is embedded in a structure with its own sets of rules. In the case of fan fiction, the ability to participate in a larger community in which transformative works can be shared and can receive feedback plays a central role in constituting the subculture. This reasoning does not lead to a rule of access in all contests. Indeed, it only applies to subcultures in which the cycle of publication and feedback is central to the subculture. Moreover, the fan fiction community insists that any such sharing be noncommercial.[236] Subject to these limitations, the example of fan fiction does support a limited right of dissemination.

Karen Hellekson, *A Fannish Field of Value: Online Fan Gift Culture*, 48 CINEMA J. 113, 115–16 (2009) (describing how "[w]riter and reader create a shared dialogue that results in a feedback loop of gift exchange, whereby the gift of artwork or text is repetitively exchanged for the gift of reaction, which is itself exchanged, with the goal of creating and maintaining social solidarity"); Ito, *supra* note 229, at 12 (noting how elite fan fiction writers "look to their peers for look to their peers for ongoing feedback and critique" and "acknowledge the importance of social support within the creative community").

[233] *See* Tushnet, *supra* note 207, at 7.

[234] Ito, *supra* note 229, at 11–12.

[235] *See* LESSIG, *supra* note 162, at 84 (contrasting RW culture with the presence in RO culture with authoritative sources of interpretation); *id.* at 88 (arguing that RW culture "hides the hierarchy," unlike RO culture, which "emphasizes the hierarchy").

[236] *See* Hellekson, *supra* note 232, at 114–15; Rebecca Tushnet, *Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters*, 6 I/S: J.L. & POL'Y FOR INFO. AGE 1, 3 (2008).

III. IMPLICATIONS FOR THE PERSONHOOD-BASED THEORIES OF COPYRIGHT

Reconceptualizing personhood-based theories in the manner I propose would place them on a sounder conceptual footing. Not only does it accord better with the philosophical writings on which personhood theory purports to be based. As discussed in Section A, it recognizes that creativity can affect personality in more ways than just how the outputs of the process are treated after they have been created. It accommodates the interests of follow-on authors in a way that the conventional wisdom cannot. And it provides an affirmative basis for mandating access to the existing body of creative works.

While my theory does support those normative implications, at the same time, its logic suggests a number of important limitations, which I will discuss in Section B. Specifically, it suggests that any right of access be limited to noncommercial works, educational purposes, and only as much dissemination as necessary to serve the values of community.

A. Insights

Adopting a broader sense of the ways that creative works can promote personhood yields a number of important insights. These insights in turn have important implications for copyright law.

1. A More Natural Conception of the Relationship Between Creativity and Personality

The traditional view of personality theory takes a very narrow conception of the relationship between creative expression and personality that focuses exclusively on how works are treated after they have been created. In essence, this approach treats works as static artifacts that are mere repositories of their creators' personalities.

The revised conception adopts a broader view that recognizes that the process of creating works can also play an important role in developing personality. In so doing, it embodies a more heuristic view of creativity that focuses less on the results and more on the creative process itself.

2. Greater Importance to Follow-On Authors

Another shortcoming of the conventional wisdom regarding personhood theory is that it places almost exclusive importance on the interests of the initial author. Indeed, the interest of the initial author is often regarded as being so strong as to convey absolute, inalienable control over derivative works.[237]

Kant's and Hegel's reluctance to recognize strong interests in derivative works acknowledges that derivative works reflect the personalities of follow-on authors as much as initial authors. Indeed, the process-oriented perspective on personhood reflected in the psychological, aesthetic, and philosophical literature shifts the focus away from creative works as static artifacts and instead reconceives of them as essential contributors to a dynamic process of self-actualization.

3. An Affirmative Theory of the Public Domain

The final and most important advantage of my proposed reconceptualization of personality theory is its potential to provide an affirmative theory of the public domain, the absence of which both proponents and opponents of the trend toward broader copyright protection have widely regarded a weakness.[238] As noted above, the public domain has often been defined as the residuum left after property rights have been defined. To the extent that

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[237] *See supra* note 7 and accompanying text.
[238] *See supra* notes 11–13 and accompanying text.

property justifications are economically focused, the scope of fair use naturally contracts as technological advances reduce transaction costs.[239]

The broader conception I propose supports reforming copyright in ways that reflect the full range of ways that creative works can promote self-actualization. By recognizing how creating works both can develop personality and requires access to preexisting works, my approach to personality theory provides a justification for providing follow-on authors with access to the extant corpus of creativity. To the extent that those works must be shared with others in order to be meaningful, it also supports a right of dissemination.

B. Limits

At the same time any theory implies certain types of reform, it also necessarily suggests the natural limits of those reforms. These limits come in part from the internal logic of the theory and in part from factors external to the theory that cut in the opposite direction. The presence of these internal limits and countervailing considerations offer natural reference points for determining the proper scope of any reforms taken in the name of my revised vision of personhood theory.

1. Noncommericality

One major limit is the extent to which any personhood-based rights of access and dissemination must be noncommercial. Commerciality has long presented a puzzle for copyright law. Some early cases regarded that the fact that a work is commercial uses presumptively fall

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[239] *See, e.g.*, Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115 (1997).

outside of fair use.[240] Later cases clarified that the fact that a work is commercial in nature does not by itself disqualify derivative works from falling within fair use.[241]

The internal logic of the way that creating works develops personality suggests limiting the right of access to noncommercial uses. Kant's initial exposition of how creative works can develop personality emphasized that the experience must be disinterested from personal wants and needs.[242] Psychological theory emphasizes that individuals can only pursue self-actualization after their more instrumental needs have been satisfied and that such self-actualization can only occur when people live in the moment, creating for its only sake without any focus on the implications for the future.[243]

Lessig similarly focuses on the differences between commercial and gift cultures, emphasizing the differences in values[244] and observing that "price is poisonous" to reciprocal noncommercial cultures.[245] While Lessig would not limit access rights to noncommercial uses,[246] only noncommercial uses would be free, with those making commercial remixes having to pay a compulsory license fee.[247] Indeed, Lessig's recognition of the benefits associated with commercial creativity necessary entails some type of balance.[248]

The rationale for allowing authors to share works created from other works also militates against including commercial works within its scope. As noted earlier, the fan fiction community has adopted a strong norm against commercial uses as inconsistent with the

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240 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).
241 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583–85 (1994).
242 *See supra* note 100 and accompanying text.
243 *See supra* notes 131, 138, 148 and accompanying text.
244 LESSIG, *supra* note 162, at 118, 144–49, 232, 239
245 *Id.* at 149.
246 *Id.* at 56.
247 *Id.* at 254–56; *see also id.* at 110–14 (describing how compulsory licensing would have benefitted remix culture).
248 *See supra* note 200 and accompanying text.

reciprocity of exchange.[249] Indeed, many regard commercial compensation as inconsistent with the reciprocal values that undergird the fan fiction community.[250]

The internal logic of this vision of personhood suggests limiting any access and dissemination rights to noncommercial uses, as the need for self-actualization would be satisfied by the noncommercial uses. Although some suggest that the distinction between these commercial and noncommercial uses may prove slippery,[251] personhood justifications do not support a broader set of reforms.

2. The Emphasis on Education

Another limitation implicit in some portions of the theory is an emphasis on youth-oriented education. For example, education plays a key role in Lessig's lauding the fact that remix allows children to learn through materials they find particularly interesting, noting that "[w]hen kids get to do work that they feel passionate about, kids (and, for that matter, adults) learn more and learn more effectively.[252] This sharing helps develop cultural literacy and serves as a form of apprenticeship in which they actually learn more.[253] Although Lessig does offer a nod toward adult learning, his rationale applies with special force to the education of children.

Rebecca Tushnet similarly emphasizes education when enumerating the benefits of fan fiction. Fan fiction creates "a unique opportunity for learning, personal expression, and individual autonomy."[254] Participation also enhances health so "that we should encourage these

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249 *See supra* note 236 and accompanying text.
250 Hellekson, *supra* note 232, at 115.
251 *See* Fisher, *supra* note 144, at 1433–35; Tushnet, *supra* note 236, at 3–4.
252 LESSIG, *supra* note 162, at 80.
253 *Id.* at 81; *see also id.* at 27 (noting how John Phillips Sousa celebrated amateur musician ship "because it produced a musical culture: a love for, and an appreciation of, the music he re-created, a respect for the music he played, and hence a connection to a democratic").
254 Tushnet, *supra* note 207, at 7.

kinds of social institutions for youth."[255] Adapting preexisting stories also helps children develop cultural literacy.[256]

To the extent that these rationales emphasize youth-oriented education, they impose natural limits on the scope of any reforms implied by the theory. They would provide less support for extending rights of access and dissemination to noneducational contexts.

3. Other Limits to the Rights of Access and Dissemination

Lastly, saying that personhood theory implies a right of dissemination is not to say that such a right should be unlimited. On the contrary, the presence of countervailing considerations (such as the benefits of commercial authorship recognized by Lessig) suggests that any such rights be limited to the amount necessary to support self-actualization.

For example, any right to create derivative works must be balanced against protecting the rights of the initial authors. For example, in recognizing that follow-on authors may make a sufficient contribution to justify trumping the interests of initial authors, both Kant and Hegel implicitly recognize that initial authors have personality interests that are not overcome until the interests of follow-on authors become sufficiently important. Any other conclusion would sidestep the problems of giving exclusive primacy to the interests of initial authors only by falling into the opposite trap of giving exclusive primacy to the interests of follow-on authors.

The same could be said for any personhood-based right of dissemination. Recognizing that content must be shared with a community to be meaningful does not necessarily entail an unlimited right to disseminate. On the contrary, any such right would naturally be limited to the amount and the community needed for authorship to be meaningful. For example, while the role

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[255] *Id.*
[256] *Id.*

of the narratee and implied reader recognized by literary theory may require that the derivative work be read by someone in order to promote self-development, it does not necessarily require that the work be available to the broadest possible audience. Instead, the presence of competing interests dictates that the dissemination right would be limited to the smallest possible number of readers needed to allow the creative process to be self-actualizing. Similarly, any need to share creative works with a community would logically be limited to that community. It would not entail a right to disseminate works more broadly.

These inherent limits underscore the value of any good theory. Any arguments used to justify a position necessarily only go so far. The scope of the reasoning thus inevitably includes its own limitations. Proper application of personhood theory thus requires a clear understanding of why certain reforms are justified and a readiness to cease advocating for further reform after those rationales have been exhausted.

CONCLUSION

Personhood theory occupies a central place in copyright theory. Enshrined in the institution of moral rights, personhood theory is widely regarded as giving initial authors absolute, inalienable control over many aspects of their works.

In this Essay, I have argued that the conventional wisdom about personhood and copyright justifications suffers from some fundamental problems. As an initial mater, it is based on an erroneous philosophical provenance. Although personhood-based justifications for copyright are usually attributed to Kant and Hegel, a close reading of Kant's and Hegel's theories and even more importantly their writings on unauthorized copying belie any such a one-sided interpretation.

Even more importantly, the classic view adopts too narrow a vision of the ways that creative expression contributes to personality. It fails to recognize how the process of creation can play a role that can be as important as how works are treated once they have been created. In so doing, the conventional wisdom adopts a view that focuses exclusively on initial authors without taking the interests of follow-on authors into account.

My reconceptualization of personhood theory accords better with the theory's purported philosophical roots. It adopts a broader conception of personhood that takes into account a broader range of ways that creativity can foster personal development. It takes the interests of follow-on authors seriously by embracing how creativity often builds on the corpus of prior works. In so doing, it offers an affirmative theory of why copyright law should provide access to existing works. The importance of readers and the need for authorship within a community arguably supports a right of dissemination.

Like any theory, the revised conception of personhood theory carries with it limits as well as justifications. It suggests that any such rights be limited to noncommercial and educational uses. Moreover, rights of access and dissemination should be limited to the amount necessary for follow-on authors to develop their personalities. As with any initial attempt to rethink an area of law, many of the ideas presented here are somewhat exploratory and will no doubt be refined, extended, and criticized in the future. I certainly expect that this will be the first rather than the last word in a long debate.