

**What's So Bad About Stealing?
(Forthcoming, J. OF TORT LAW (2011))**

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**USC Center in Law, Economics and Organization
Research Paper No. C11-6**



**CENTER IN LAW, ECONOMICS
AND ORGANIZATION
RESEARCH PAPER SERIES**

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WHAT'S SO BAD ABOUT STEALING?

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Forthcoming, *Journal of Tort Law* (2011)

ABSTRACT

The moral prohibition against theft, and legal causes of action against trespass and like activities, are usually stated in absolutist terms that admit few exceptions. But application of the theft prohibition to creative goods is incomplete and unstable across industries, regions and periods. Existing economic explanations for the theft prohibition either overestimate its scope of application in creative environments or fail to specify a mechanism by which adjustments in its scope are implemented. A “power” approach that ties changes in the moral and legal treatment of “creative theft” to the distribution of formal and informal “influence capacities” across affected populations may have greater explanatory force. This broadly-applied political-economic approach derives changes in the tolerance of creative theft from the full range of formal and informal actions that may be taken by net users and net producers to facilitate or constrain the unconsented use of creative goods. Unlike conventional political-economic accounts in the copyright literature, this approach anticipates the substantial influence that dispersed net users (and allied corporate interests) have exerted historically over the development of copyright law and the especially powerful influence that net users (and allied corporate interests) currently exert over the partial demise of copyright law and associated norms in leading content markets.

“Thou shalt not steal” has been an admonition followed since the dawn of civilization.

-- Statement of court in litigation concerning alleged copyright infringement constituted by sampling of the song, “Alone Again, Naturally” (*Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, S.D.N.Y. 1991)

I shall not easily forget the expense and anxiety and horrible injustice of the Carol case; where, in asserting the plainest right on earth, I was really treated as if I were the robber instead of the robbed.

-- Statement reportedly made by Charles Dickens in 1847, referring to the copyright infringement litigation he had brought against unauthorized publishers of his novel, *A Christmas Carol*¹

INTRODUCTION

The intentional torts of trespass against land and chattels, and the underlying property interests which they protect, are surely a foundation of any legal system that supports the private production of goods and services. The prevalence of these causes of action against theft—technically, involuntary transfers—even prior to the earliest development of common law legal systems² supports this intuition. But the trespass tort and its related causes of action presuppose a common set of normative expectations that identifies the set of goods to which the underlying theft prohibition applies. If there were no widely obeyed norm against trespass of land and conversion of property, it would be exceedingly costly to enforce the formal laws against it, or in the absence of supplemental state enforcement, to undertake self-help measures to do so. That consensus may appear to be well-settled with respect to real property (my house) and most forms of tangible property (my car). That normative consensus tracks a positive consensus. Despite periodic intellectual fashions to the contrary, empirical evidence is clear that secure property rights are a critical ingredient in economic growth.³ At least as a matter of wealth maximization (and even, it sometimes appears, as a matter of wealth distribution⁴), it is

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¹ H.M. PAULL, *LITERARY ETHICS: A STUDY IN THE GROWTH OF THE LITERARY CONSCIENCE* 56 (1928).

² WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1-2 (1987).

³ For a review of findings, see David L. Weimer, *The political economy of property rights*, in *THE POLITICAL ECONOMY OF PROPERTY RIGHTS* 8 (ed. David L. Weimer 1997).

⁴ See HERNANDO DE SOTO, *MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (arguing that difficulty to obtain legal title over property is a principal

largely uncontroversial to assert that secure property interests in land and tangible goods dominate any alternative entitlement regime.

However, any such consensus is often *unsettled* with respect to intangible goods—ideas and the various technologies and forms of expression in which those ideas are embodied—and, especially, to the set of creative goods protected by copyright. There are more than a handful of serious commentators who refuse to extend, or decline to presumptively extend, the empirically-grounded logic behind property rights in land and tangible assets to property rights in ideas, forms of expression and other intangible assets.⁵ Unlike the real property context, empirical evidence provides little guidance to settle this debate: there is little systematic inquiry as to whether secure copyright results in increased economic growth or creative output.⁶ Scholarly and judicial confusion as to the appropriate legal treatment of creative appropriation tracks popular confusion as to the appropriate moral treatment. While stealing a car is uncontroversially blameworthy, downloading a song or movie without paying for it is not. The ambiguous moral treatment of creative trespass is not new. Since the invention of the video cassette recorder, users have been recording television programs, and since the invention of the tape recorder, users have been compiling “mixtapes”, in both cases without content holders’ explicit permission, without fear of legal penalties, and with little moral tribulation.⁷ Clearly moral intuitions with respect to involuntary seizures of intangible goods differ in complexity, determinacy and variety from moral intuitions with respect to involuntary seizures of tangible goods.

Together with the property interest that it protects, and the supporting set of social norms, the tort of trespass comprises what Alvin Klevorick once called a “transaction structure”: that is, “the terms on which particular transactions or exchanges are to take place under different circumstances.”⁸ Hence, normative debates over the uncompensated replication and distribution of creative goods through digital technologies can be construed as discussions over the socially appropriate transaction structure—as implemented through adoption and enforcement of supporting laws and norms—for generating, delivering and exchanging those goods. A brute fact, however, suggests that

factor that prevents the poor in developing countries from realizing the economic value of their land holdings).

⁵ For well-known skeptical discussions of the copyright and patent systems, respectively, see BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967); FRITZ MACHLUP, *AN ECONOMIC REVIEW OF THE PATENT SYSTEM*, STUDY NO. 15 OF THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, 85TH CONG., 2D SESS. (1958).

⁶ On the most exhaustive study to date, see Raymond Shih Ray Ku, Jiayang Sun & Yiyang Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty*, 62 VAND. L. REV. 1669 (2009), and for a review of the meager body of relevant evidence, see I.P.L. Png, *Copyright: A Plea for Empirical Research*, 3 REV. ECON. RES. ON COPYRIGHT ISSUES 3 (2006). Empirical evidence is far more abundant and somewhat more determinate in the case of patents, which seem to provide meaningful incentive effects in the case of certain industries (notably, pharmaceuticals and chemicals) and certain firm types (notably, smaller and unintegrated firms). For a full review, see Jonathan M. Barnett, *Do Patents Matter? Empirical Evidence on the Incentive Thesis*, in LAW, INNOVATION AND GROWTH (ed. Robert Litan, forthcoming 2011).

⁷ As a matter of copyright law, the former action is legal (provided it is undertaken for “time-shifting” purposes, following *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984)) while the latter is not (although apparently never prosecuted unless distributed for profit).

⁸ See Alvin K. Klevorick, *The Economic Theory of Crime*, in NOMOS XXVII (ed. J. Roland Pennock & John W. Chapman 1985).

these debates are moot to a certain extent. Mass trespassers have already effectively prevailed as a matter of norms and law (as enforced) in some content-based industries that formerly enjoyed robust protections against unauthorized copying. Given enforcement difficulties, major record labels have abandoned a once-aggressive policy of individual enforcement and therefore effectively waived copyright protections with respect to individual users.⁹ Entire industries have lost substantial ability to control the usage and distribution of valuable content: the challenging conditions of the music and newspaper industries are well-known. Among some or even most user populations, the moral ranking of uncompensated copying has been disturbed, neutralized or even inverted. The exotic ethics of the hacker have become the pedestrian ethics of the suburban household: what would once have been pejoratively called “stealing” might today be laudably called “sharing” or “borrowing”.¹⁰

The sheer breadth of user expropriation, which reflects the exorbitant cost of copyright enforcement and the nominal cost of copyright infringement, has overwhelmed legal rules or moral norms that would dictate any alternative transaction structure. Without any formal change in the law, trespass has become normalized (or, from a historical perspective, re-normalized) in large fields of content production. The partial demise of copyright, and associated social norms, illustrates a basic observation that applies generally across creative goods markets. Namely: the set of creative goods over which the theft prohibition applies is susceptible to dramatic and rapid change. That observation reflects an underlying logical characteristic of the theft prohibition in general. “Thou shalt not steal” is an empty proposition insofar as it contains no internal principle by which to designate the set of goods to which it applies.

It is the absence of any stand-alone boundary-definition principle that explains why the formal extension of property rights, and associated informal norms against involuntary transfers, to some classes of creative goods but not others—or to *any* creative goods for that matter—can appear to be arbitrary. Prior to 1856, U.S. copyright law did not clearly protect dramatic works but then suddenly it did; prior to 1891, U.S. copyright law did not extend to the works of foreign authors but then suddenly it did; prior to 1897, U.S. copyright law did not extend to public performances of musical compositions but then suddenly it did; and so on.¹¹ The absence of any independently persuasive principle by which to account for those changes may account for the frequent recourse to value-

⁹ In December 2008, the Recording Industry Association of America announced that its members would no longer bring copyright infringement suits against individual users engaged in sharing files of pirated music or other copyrighted content. See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. ONLINE, Dec. 19, 2008, available at <http://online.wsj.com/article/SB122966038836021137.html>.

¹⁰ A survey of internet users in 2004 found that 58% reported that “they did not care” if downloaded music was protected by copyright. See Mark Schulz, *Copynorms: Copyright Law and Social Norms*, in INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 220 (Vol. 1: Copyright and Related Rights, ed. Peter K. Yu), citing Lee Ranie et al., *Pew Internet Project and Comscore Media Metrix Data Memo* (Apr. 2004), avail. at http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf. For other evidence that unauthorized duplication of music and movies is widely considered to be acceptable, see Tom R. Tyler, *Compliance with Intellectual Property Laws: A Sociological Perspective*, 29 N.Y.U. J. INT’L L. & POL’Y 219, 219-20 (1996).

¹¹ All dates based on information set forth in U.S. COPYRIGHT OFFICE, INFORMATION CIRCULAR 1A: UNITED STATES COPYRIGHT OFFICE: A BRIEF INTRODUCTION AND HISTORY, available at <http://www.copyright.gov/circs/circ1a.html>.

laden rhetoric that characterizes contemporary discussions in copyright scholarship: where objective grounds are lacking, sentiment and ideology dominate. In contrast, I start by disclaiming any normative principle that can independently generate the set of creative goods that *should* be subject to the theft prohibition. *A priori* the set may be empty, complete or cover some intermediate domain. I then ask a positive question: is it possible to identify at some reasonable approximation the mechanism by which the composition of the protected set of creative goods changes over time and across markets?¹² Applying the analytical tools supplied by new institutional economics and public choice theory¹³ yields a simple thesis: power makes (and *un*makes) rights. Power is deployed on two fronts: (i) on the *lobbying front*, producers and users of creative goods devote resources to influencing legislative and judicial allocations of property rights, and (ii) on the *enforcement front*, the holders of creative goods devote resources to enforcing those rights while the users of creative goods devote resources to evading them. The scope of application of the theft prohibition is therefore not arbitrary: it is the outcome of rational investments by affected interests in the lobbying/counter-lobbying and enforcement/evasion processes by which the prevailing transaction structure is continuously determined.

This “power” approach yields a deterministic but dismal prediction. Namely: well-endowed and well-organized interests promote transaction structures that constrain copying in order to capture private rents at the public expense. But this widely-held view is inconsistent with the rampant appropriation that characterizes creative goods markets: constituencies with weak influence capacities (users) seem to prevail over constituencies with strong influence capacities (content holders).¹⁴ As a matter of simple probabilities, the *effective* enforcement of copyright in any number of content industries is low even in jurisdictions that provide formally robust copyright law protection. Even as a formal matter, this view is inconsistent with the patchwork topography that characterizes the finely-negotiated Copyright Act and the case law that interprets it: a core set of property rules qualified by liability rules that permit unauthorized usage with due compensation to the rights holder and no-liability rules that permit unauthorized usage without any compensation to the rights holder. While some portions of the Copyright Act fit the traditional story of regressive transfers from dispersed end-users to concentrated content firms, other portions reflect horizontal transfers among content firms, technology firms, and distribution intermediaries, and even progressive transfers from content firms to end-users. The Copyright Act looks more like the multilateral interest-group bargains

¹² This strictly positive framework generalizes an approach I have set forth previously with respect to changes in patent protection in technology settings and then applies it specifically to copyright protections in creative settings. See Jonathan M. Barnett, *Property as Process: How Innovation Markets Select Innovation Regimes*, 119 YALE L. J. 284 (2010).

¹³ For a prior contribution that applies these analytical frameworks to the copyright context, see Antonina Bakardjeva Engelbrekt, *Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation*, 4 REV. ECON. RES. ON COPYRIGHT ISSUES 65 (2007).

¹⁴ By “influence capacities”, I refer broadly to all actions that can influence the effective level of legal or norm-based restrictions on the unauthorized use of intellectual goods. That includes actions that are usually categorized under the rubric of “rent-seeking” activities, such as lobbying in the political venues where intellectual property rights are determined and enforcing those rights in court, as well as efforts to evade or simply ignore those rights.

implemented by the tax code than the one-way interest-group transfers implemented by agricultural subsidy programs.

The conventional view fails to track real-world complexities because it ignores two countervailing sources of influence in the lobbying and enforcement processes by which copyright entitlements are allocated and implemented. Taking into account those sources identifies typical circumstances where transaction structures in creative goods markets may be especially well-protected *against* disproportionate influence by interests that demand socially excessive constraints on creative trespass. This claim relies on two observations. First, the high costs of enforcing copyright and the low costs of evading it mean that dispersed users can undermine the stability of any transaction structure that excessively constrains copying. Second, weak users have powerful allies: concentrated interests that profit from the sale of trespass technologies, or the unconsented distribution of creative content, can exert influence through formal channels to promote legislative and judicial outcomes that favor dispersed users' interests. Anticipating informal expropriation in the market and formal expropriation in the legislature or courts, seemingly powerful content firms rationally concede partial defeat and forfeit a portion of their creative holdings to the public domain. Mass trespass, as facilitated by the provision of trespass technologies and services by outside providers, is akin to a credible entry threat posed to a monopolist firm: it restrains the otherwise disproportionate influence of concentrated interests in the commercial and political marketplace.

This paper's core contribution is ultimately methodological. Even if framed by reference to ideological or other value-based principles that are ostensibly articulated in the public interest, transaction structures for creative goods markets—comprised by property rights and the supporting set of social norms¹⁵—are most usefully understood as strategic arrangements designed to maximize payoffs for privately-interested parties. This is a strictly positive approach to creative misappropriation as a political-economic problem, rather than a moral or ideological problem that is inherently objectionable or laudable (a common approach in the legal literature and popular commentary) or a (strictly) economic problem that can be resolved by an outside analyst under conditions of perfect information (a common approach in the economic literature). Ultimately this positive analysis modestly informs normative analysis. Analysis of the manner in which changes in governing transaction structures alter *division* of the social product constituted by creative output provides insight into the extent to which those changes tend to advance the collective interest in maximizing the *total* social product constituted by creative output. If changes in the transaction structures that govern the production and distribution of creative goods reduce to a function of lobbying, litigation and other “influence actions” undertaken by privately-interested parties, then it is the balance of influence capacities that determines whether those changes promote the general interest. And if that is the case, then it may be possible to make progress toward evaluating the *substance* of existing transaction structures in creative goods markets—an exercise

¹⁵ Transaction structures also include extralegal protection technologies and all other methods by which content holders can restrict unconsented usage. For sake of simplicity, I generally omit these additional factors from the analysis; for brief discussion, see *infra* note 80 and accompanying text. In a prior work, I addressed at length the interaction between legal and extralegal protection strategies in determining the aggregate level of protection against third-party usage. See Jonathan M. Barnett, *Is Intellectual Property Trivial?*, 157 U. PA. L. REV. 1691 (2009).

otherwise fraught with uncertainty—by examining the *processes* by which those structures are continuously re-determined.

Organization is as follows. In Part I, I identify the discrepancy between the universal formulation of the theft prohibition and the divergent application of that prohibition in creative goods markets. In Part II, I assess existing efficiency explanations for the theft prohibition, which either overestimate its scope of application or fail to specify an institutional mechanism by which changes in the prohibition are implemented. In Part III, I provide a qualified efficiency account that ties changes in the application of the theft prohibition in creative goods markets to the distribution of influence capacities across interested constituencies. The results are cautiously optimistic.

I. IS IT ALWAYS IMMORAL TO STEAL?

From the viewpoint of “everyday morality” (i.e., moral norms as typically understood in everyday circumstances), the theft prohibition admits few exceptions outside of isolated cases of extreme necessity. This absolutist formulation tracks the substance of common law trespass actions, which (with limited exceptions in cases of necessity¹⁶) entitle the property owner to an injunction against future trespass, sometimes even supplemented by supercompensatory damages for past trespass.¹⁷ Familiar forms of moral or legal reasoning in cases of unconsented seizures of physical goods do not make any room for finely balancing competing uses of the disputed asset, as would be demanded by a strictly instrumentalist economic analysis.¹⁸ In matters of ownership, both law and morality prefer simple over complex rules.¹⁹

It is common to find in policy discussions, legal commentary and judicial pronouncements²⁰ reflexive applications of the theft prohibition to unauthorized use of literary and other creative material. But absolutist application of the theft prohibition sits uncomfortably with an anthropological fact. While the prohibition may apply universally in its general formulation (“do not steal”), the set of creative goods to which the theft

¹⁶ The necessity defense to trespass claims is limited to cases of private necessity, which still entitles the rights holder to monetary compensation for any damage caused by the trespass, and public necessity, in which case the rights holder is not entitled to any compensation. On private necessity, see *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910) (finding that private necessity can permit an individual to take another’s property but defendant is required to compensate plaintiff for damage caused to plaintiff’s dock when defendant tied his vessel to the dock due to a violent storm); on public necessity, see *Surroco v. Geary*, 3 Cal. 69 (1853) (holding that mayor of San Francisco was not liable to compensate plaintiff for damages to his property caused as a result of demolition authorized by defendant to prevent an imminent public disaster). An often-discussed case on private necessity, *Ploof v. Putnam*, 71 A. 188 (Vt. 1908), excuses the trespass but does not provide for compensation; however, that seems to be due to the fact that the trespass caused no damage.

¹⁷ See *Jaque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wisc. 1997) (in case of intentional trespass, awarding nominal compensatory damages and \$100,000 in punitive damages).

¹⁸ For an example of this type of analysis, see *infra* Part II.A.

¹⁹ In several contributions, Thomas Merrill and Henry Smith have emphasized this point. See, e.g., Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2006).

²⁰ See *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F.Supp. 182, 182 (S.D.N.Y. 1991) (“‘Thou shalt not steal’” has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed.”). The judge in that case referred the defendant for criminal prosecution on the ground that it had engaged in intentional copyright infringement by sampling a portion of a copyright-protected song.

prohibition applies (“do not steal *x*”) fluctuates considerably, both geographically and historically.²¹ That is: while the norm in its generic formulation is stable across time and space, its scope of application with respect to creative goods is volatile.

Substantial variation is observed in legal and normative constraints on unconsented use of creative goods. This tendency appears both across time and industries. What is borrowing in 16th-century English literature²² becomes somewhat controversial (but still widely practiced) in the 17th century²³ until it is more widely treated as stealing by the 18th century (as implemented in 1709 by enactment of the Statute of Anne)²⁴ and then appears to revert (in part) to borrowing by the early 21st-century. What is considered innocuous borrowing in one industry (fashion) is considered to be infringement giving rise to legal action in another (music or film) and plagiarism giving rise to reputational sanction in yet another (academic writing).²⁵ Even creative markets that currently operate subject to the most robust forms of copyright protection do not foreclose all uncompensated uses. Entire classes of creative goods are largely deemed ineligible for copyright protection: generic or stylistic elements in cultural works (under the *scènes-à-faire* doctrine)²⁶, functional elements in industrial designs²⁷, and factual material.²⁸ Most

²¹ To a lesser but still important degree, the same observation could be made with respect to property rights in land and tangible goods. Remarkably, the theft prohibition was only firmly established over the full range of physical goods at a relatively late stage. Until the turn of the 19th century, English legal practice and trade custom tolerated limited “gleaning” by workers of scrap material in industrial production and produce in agricultural work. See Douglas W. Allen & Yoram Barzel, *The Evolution of Criminal Law and Police During the Pre-Modern Era*, J. L. ECON. & ORG. (forthcoming). Due to widespread defiance by the poor and sympathy among some enforcement authorities, gleaning practices in some regions persisted for as much a century after civil judgments that initially rendered those practices liable for prosecution as theft. See PETER KING, *CRIME AND LAW IN ENGLAND, 1750-1840: REMAKING JUSTICE FROM THE MARGINS* Ch. 10 (2006).

²² On the relaxed attitudes toward borrowing and imitation of literary content during the 16th century among English writers, see HAROLD OGDEN WHITE, *PLAGIARISM AND IMITATION DURING THE ENGLISH RENAISSANCE* (1935). As White notes, however, these relaxed attitudes were not without bound: both the English writers, and the classical Greek and Roman sources from which those writers drew authority, tolerated imitation but denounced copyists who did not give appropriate attribution to the original source. See *id.*, at 15-18.

²³ See *id.*, at Ch. IV, which provides evidence of gradually increasing concern over imitation among English writers starting in the early 17th century. Apparently, however, such concern did not deter continued borrowing practices during roughly the same period. See PAULL, *supra* note 1, at Ch. IX.

²⁴ On the rise of originality as a literary value in English literature, see MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 6 (1993); see also THOMAS MALLON, *STOLEN WORDS* 24 (1989) (noting that the importance of originality in literary expression only was established in English literature in the middle of the 18th century). Note that the effective level of copyright protection at the onset of formal copyright protection in England appears to have been relatively low, as suggested by widespread piracy of literary works in the 18th century and into the 19th century. See PAULL, *supra* note 1, at Ch. IV.

²⁵ See Stuart P. Green, *Plagiarism, Norms and the Limits of Theft Law*, 54 HASTINGS L. J. 167 (2002) (observing that plagiarism among academic writers is largely prosecuted through reputational sanctions and rarely gives rise to legal action). Even attitudes with respect to plagiarism and related practices can vary within an academic specialty. See Walter Enders & Gary A. Hoover, *Whole Line Is It? Plagiarism in Economics*, 42 J. ECON. LIT. 487 (2004) (reporting survey results showing differing attitudes among economics journal editors toward different types of plagiarism).

²⁶ See, e.g., *Joshua Ets-Hokin v. Sky Spirits Inc.*, 225 F.3d 1068 (9th Cir. 2000) (denying copyright infringement claim based on defense of *scènes à faire* with respect to certain stylistic elements of a photograph of a vodka bottle).

dramatically, the “fair use” provision enables certain publicly-interested uses of copyrighted material without any compensation owing to the copyright holder.²⁹ Arguably, only a minority of the total attributes embodied by the creative goods released into the market are legally entitled to watertight protection akin to a property right in land or chattels. Taking into account the high costs and low probability of detection and enforcement, even a smaller minority of those legally protected elements are effectively protected by copyright.³⁰

Temporal, cultural and industrial diversity in application of the theft prohibition to creative goods erodes the explanatory force of any simple justification grounded in everyday morality. All cultures agree and teach that “it is wrong to steal”; but this is not especially helpful since cultures (and sub-cultures) widely *disagree* on the composition of the set of creative goods with respect to which it is wrong to steal and even the same culture does not fully extend the theft prohibition to all creative goods. All morally formulated judgments with respect to the uncompensated replication of creative goods would therefore appear to be conventional, not logical.³¹ Any given set of norms with respect to uncompensated copying then reduce to mere products of historical accident

²⁷ 17 U.S.C. §101 (stating that a design of a “useful article” is only eligible for copyright protection “if, and only to the extent that, such design incorporates such pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently from, the utilitarian aspects of the article”).

²⁸ *See, e.g.,* Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980) (denying infringement claim with respect to movie adaptation of a non-fiction book setting forth a novel theory of the cause of the Hindenburg disaster, on grounds that infringed material was factual in nature and therefore ineligible for copyright protection).

²⁹ 16 U.S.C. §107.

³⁰ Copyright scholarship often states that copyright laws are being aggressively enforced by focusing on isolated cases of individual users subjected to sanctions for copyright infringement as a result of unauthorized use of copyrighted material. *See, e.g.,* LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 206 (2004). This must assume either economic irrationality or extreme risk-aversion on the part of users: a large sanction applied in a very small number of cases reduces to a nominal sanction in expected-value terms when discounted by the probability of detection and enforcement. User behavior in the form of widespread copyright infringement appears to anticipate this nominal penalty: as a probabilistic matter, copyright laws are hardly being enforced at all against individual users, who therefore rationally violate those laws virtually at will. For evidence that users respond rationally to the nominal threat of enforcement (by infringing!), see Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127 (2005).

³¹ I recognize that this view of “creative morality” as convention will not come as a surprise to moral philosophers who take the view that moral beliefs or norms are best understood as social conventions peculiar to a given polity or normative community. For a recent example of this view with respect to property rights, see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002). For the ultimate source on the conventional nature of property rights, see DAVID HUME, *A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS* 264 (Vol. 2, 1874) (“No one can doubt, that the convention for the distinction of property, and for the stability of possessions, is of all circumstances the most necessary for the establishment of human society . . .”). My point is simply that everyday moral reasoning with respect to application of the theft prohibition, which is usually articulated in absolutist terms, provides a poor account of the inconsistent application of that prohibition to copying practices in creative markets. I defer to philosophers as to whether it is possible to develop a sophisticated morality of creative property norms that can account for that apparently inconsistent pattern. I am grateful to Greg Keating for providing guidance on this point.

divorced from any independent source of authority that stands outside a particular normative community. This type of observation implicitly drives skeptical dismissals of moral or legal constraints on unauthorized copying that are prevalent in popular and some legal academic commentary. Based on observed cross-cultural or cross-temporal discrepancies in copying norms, these arguments tend to conclude that any moral prohibition against creative appropriation constitutes an *ad hoc* cultural peculiarity without any independently persuasive justification.³²

This relativist critique offers a powerful objection to the normative legitimacy of any moral or legal constraint on the unconsented copying of creative goods. Existing moral practices and legal rules can explain why certain contemporary practices in creative goods markets *happen* to be designated as “theft” (a merely descriptive statement). But those practices and rules cannot provide a stand-alone set of reasons why that has *come to be* the case (an explanatory statement) or why that *should* be the case (a prescriptive statement). Perhaps it is possible to do better. The remainder of this paper is largely devoted to this explanatory question. That in turn will cast some light on the even more difficult-to-resolve prescriptive question.

II. IS IT EVER EFFICIENT TO STEAL?

In this Part, I examine whether it is possible to formulate an independent non-circular justification for any particular scope of application of the theft prohibition by using economic reasoning that pursues social efficiency as its normative objective.³³ Legal and economic scholars have devoted some attention to articulating a non-morality-based instrumentalist justification for the theft prohibition. If successful, this efficiency-driven exercise would provide a sound basis for the theft prohibition to the extent that it can account for past, and anticipate future, variations in the scope of norms and laws against theft without reference to a moral convention that is peculiar to a particular market, period or region. If that could be achieved, then the composition of the set of creative goods over which the theft prohibition applies would no longer be arbitrary as a positive matter.

A. A Nearly Absolute Economic Case Against Theft

Even in the standard context of physical goods, establishing an economic rationale against theft is more complex than might otherwise be thought to be the case. The difficulty is as follows. Contrary to everyday moral intuitions, economic cost-benefit

³² For a typical and well-known example, see John Perry Barlow, *The Economy of Ideas*, WIRED, Issue 2.03, March 1994, available at http://www.wired.com/wired/archive/2.03/economy.ideas_pr.html (noting that storytelling, jazz improvisation, stand-up comedy routines and other cultural forms proceed by free circulation and improvement, and questioning need for copyright to promote artistic effort).

³³ Consistent with economic analysis generally, I equate social efficiency with aggregate wealth maximization. That is an imperfect but facilitative assumption that is not intended to express any view in the complex debate over the appropriateness of selecting wealth maximization (without reference to distributional, equity or other non-wealth-based considerations that may be relevant within a broader utilitarian framework) as the governing social objective. However, as I argue subsequently, taking into account distributive considerations may be a necessary component of any wealth-maximization analysis of property rights, at least as applied in intangible goods markets.

analysis must recognize that a theft could be socially efficient to the extent that the thief values the stolen asset more than the owner. A social gain will then result equal to the positive difference between the owner's and the thief's valuations of the asset, plus the transaction-cost savings from the foregone sale of the stolen asset.³⁴ This satisfies the Kaldor-Hicks criterion of social efficiency: the winners gain more than the losers, in which case the winner could be hypothetically compensated even if no actual compensation is made. It is important to note that this contingency can only hold true in a high transaction cost setting. Otherwise the owner would willingly sell the asset to the thief in a market transaction, yielding the same social gain but replacing actual with hypothetical compensation—in which case the transaction would satisfy the more rigorous standard of Pareto efficiency (which requires that all losers are *actually* compensated).

Even with this caveat, theft may still be efficient in high transaction cost settings where a potential thief derives greater utility from a particular item than its current owner. But the analysis is not yet complete. To do so requires taking into account the indirect effects of tolerated theft. The circumstances under which theft could be efficient now narrow considerably. For that to be true, it must be the case that the thief's gains (plus any transaction-cost savings) exceed the owner's losses *and* the indirect costs that would arise as a result. In the absence of a widely obeyed theft prohibition, any gains from coerced transfers would most likely be offset by the sum of thieves' investments to effect these transfers, owners' investments to prevent these transfers³⁵ and depressed consumption and investment given the increased risk of theft.³⁶ So, after some considerable labor, the economic analyst can reasonably conclude that it is likely—perhaps it can even be ventured, extremely likely—that theft is almost always inefficient and therefore should be prohibited in all cases assuming courts have positive information costs and cannot perfectly distinguish between efficient and inefficient thefts.³⁷

³⁴ See Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, INT'L REV. L. & ECON. (1997). As the authors point out, if the thief engages in a subsequent sale (as may be likely), then the theft would not result in any transaction-cost savings (i.e., it would simply interject an intermediate step prior to the ultimate sale).

³⁵ See Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 WESTERN ECON. J. 224 (1967). The point is restated in Fred S. McChesney, *Boxed In: Economists and Benefits from Crime*, 13 INT'L REV. L. ECON. 225 (1993). Richard Posner disputes the likelihood of this contingency for a different reason: namely, given the market's capacity to drive goods to the highest-valuing users, it is unlikely that any prospective thief would have a higher willingness to pay than any existing owner *and* be unable to enter into a voluntary exchange with the owner at a sufficiently low transaction cost. If that is the case, then the primary social cost of theft is that it enables wealth-depleting transfers to lower-valuing users, which defeats the allocative effects of the market pricing mechanism, or it enables wealth-enhancing transfers to higher-valuing users who opportunistically wish to avoid compensating the existing asset holder, an inferior result relative to a market transaction that would realize the improved resource allocation without any indirect costs resulting from insecurity of property holdings. In both cases, the theft prohibition drives wealth-enhancing transactions into the market, where they *should* occur. See Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); LANDES & POSNER, *supra* note 2, at 160.

³⁶ See Hasen & McAdams, *supra* note 34.

³⁷ This conclusion would be further bolstered by taking into account the positive costs associated with the increased litigation costs required to adjudicate theft prosecutions under a standard that must distinguish between efficient and inefficient thefts. A less tailored rule that treats all thefts as inefficient is far less costly.

The economic case against theft may be complex and (slightly) qualified but we can derive some assurance that it is correct for two reasons. First, the generality of the economic case against theft tracks moral intuitions that “theft is wrong” across a broad if not universal range of circumstances. Second, even the qualifications to the economic case against theft anticipate the few cases where the theft prohibition is lifted as a legal matter in the common law of trespass. Consider the two primary exceptions: the private necessity defense, which converts the standard property rule into a liability rule, and the public necessity defense, which converts the standard property rule into a zero-liability rule.³⁸ The narrow circumstances covered by these defenses closely resemble the narrow circumstances where economic analysis anticipates that involuntary transfers would be efficient, even on a net basis. Suppose the paradigmatic case where a lost hiker seeks shelter in a log cabin during a blizzard. Transaction costs are high (either because time is of the essence or the property owner would opportunistically hold up the distressed stranger for an exorbitant fee) and the trespasser derives gains from access to the property that far exceed the owner’s losses from the unwanted but temporary intrusion. Given that these distress situations are unlikely to occur with great frequency, these minor deviations from the property-rule protection normally accorded to land and tangible goods (especially if qualified by an ex post obligation to compensate the entitlement holder) is unlikely to unleash a devastating stream of indirect costs.

B. *A Contingent Economic Case Against Theft*

If we move from physical to creative goods settings, the nearly absolute economic case against theft is, in a certain sense, *too* good. For it would appear to imply that all creative goods that are costly to produce, cultivate and/or maintain—which is the precondition for anticipating the indirect losses that overwhelm the direct gains from otherwise socially efficient involuntary transfers—would be subject to the theft prohibition. But that is inconsistent with the variable application of the theft prohibition in creative goods markets. The economic case against theft set forth above is therefore unhelpful with respect to our original task: namely, to account for changes in the composition of the set of creative goods under the theft prohibition. Just like the everyday moral intuitions that it tracks, it cannot explain the surprisingly large number of creative goods settings to which that prohibition does not apply in full or in part.

The overdetermination of the conventional economic case against theft can be illustrated by reference to a historical change in real property law. Today it may be self-evident that residences clearly fall under the theft prohibition (hence, squatters can usually be evicted with little controversy) but not the airspace above a residence (hence, there is usually no cause of action against airplanes flying overhead). But the latter question was not always settled. For several decades following the invention of the airplane, U.S. courts repeatedly addressed whether the common law principle entitling an owner to all territory above and below its real property³⁹ should be curtailed to account

³⁸ For references to leading cases, see *supra* note 16.

³⁹ The exact Latin phrase is: *Cujus est solum ejus est usque ad coelum* (“he who owns the soil owns up to the sky”).

for this new development.⁴⁰ After much litigation, the courts ultimately agreed that it should (outside of the lowest reaches of the airspace⁴¹), for a simple but insightful reason: namely, the costs of enforcing an undiluted property right would be prohibitive and therefore it would be absurd to rule otherwise. As Justice William Douglas wrote in 1946 in the case that finally settled the issue: “Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Commons sense revolts at the idea.”⁴² The very fact that it took the common law several decades to reach this conclusion (the airplane was invented in 1903) sheds some light on the inability of the everyday theft prohibition to rely on any free-standing principle by which to alter the set of goods to which it applies. The same absolutist formulation that makes a well-established normative principle so resilient as a behavioral guideline renders it unable to respond to technological or other exogenous changes that challenge the basis on which the principle has been historically applied to any particular set of goods.

The “absurdity intuition” expressed by Justice Douglas provides a potential way out of this dead-end. This intuition can be expressed more formally in social cost-benefit terms as follows: a society will only admit goods within the purview of the theft prohibition so long as doing so generates investment gains in excess of administrative and enforcement costs. And conversely, as exemplified by the airspace example, society will *remove* goods from the purview of the theft prohibition whenever doing so saves administrative and enforcement costs in excess of investment losses. Whenever placing any good within the theft prohibition violates the social cost-benefit principle—or, we should say, clearly violates it—the scope of the prohibition will be modified accordingly to avoid that “absurdity”. Including unlimited airspace within the purview of the theft prohibition violates common sense: that is, it would almost certainly yield administrative and dispute-resolution costs in excess of any investment gains from enabling efficient transactions between landowners and airlines that wish to fly overhead. So airlines are free to take it—that is, a practice that happened to be viewed as “theft” is now legalized. The cost-benefit analysis perhaps becomes a closer call in the lowest reaches of the airspace—which accounts for courts’ continued tolerance of takings, trespass and nuisance claims with respect to overflights in that area.⁴³ The same rationale explains why courts in copyright infringement cases occasionally tolerate *de minimis* infractions of a copyrighted work⁴⁴ and, under the *scènes-à-faire* doctrine, consistently permit

⁴⁰ For an extensive account, see STUART BANNER, WHO OWNS THE SKY? THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON (2008).

⁴¹ Repeated overflights sufficiently low to the ground can still constitute grounds for trespass, nuisance or, in the case of a government defendant, a takings claim. For the leading case, see *United States v. Causby*, 28 U.S. 256 (1946). Note that, strictly speaking, *Causby* addresses a constitutional takings claim rather than a tort or nuisance claim under state common law. However, the Restatement of Torts adopts a similar approach, stating that a tort claim in the case of overflights requires a showing of both harm (“interferes substantially with the other’s use and enjoyment of the land”) and extremely low altitude (“immediate reaches of the air space next to the land”). See RESTATEMENT OF TORTS (SECOND) §159.

⁴² See *United States v. Causby*, 28 U.S. 256 (1946).

⁴³ For fuller discussion, see BANNER, *supra* note 40, at 259-60. For a statement of the current law, see *supra* note 41.

⁴⁴ See, e.g., *Lil Joe Wein Music Inc. v. Curtis James Jackson et al.*, 2007 U.S. App. Lexis 19165, at 10-11 (11th Cir. 2007) (stating that copying must be more than *de minimis* to support an infringement claim). See also 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, 13-50, § 13.03[A][2] (“Ordinarily, the importance of but one line in plaintiff’s work would be regarded as *de minimis*, not

wholesale uses of generic elements of a copyrighted work. The large class of unprotected attributes of creative goods can therefore be attributed to an intuitive comparison of enforcement costs versus investment gains. It is simply not worthwhile to fully implement the theft prohibition over the entire set of goods and hence, a remainder portion is forfeited to the public domain.

The underlying principle behind these contractions in the scope of application of property rights, and the trespass doctrines that implement those rights, should sound familiar. It is a paraphrase of Harold Demsetz's well-known hypothesis that a society will institute property rights over any good only to the extent that doing so generates social benefits resulting from efficient investment in excess of social costs in the form of administrative and other transaction costs.⁴⁵ There is a crucial difference between the economic thesis that upholds the theft prohibition in virtually all circumstances and the Demsetz thesis that anticipates substantial variation in the scope of application of the theft prohibition. In the former case, the circumstances under which the theft prohibition does not apply are exceedingly narrow; in the latter case, those circumstances may be quite broad—in fact, entire creative industries may (and do) operate under transaction structures that legalize large classes of uncompensated transfers.

The two economic treatments of the theft problem can be easily reconciled. The nearly absolute economic case against theft makes an implicit assumption. Namely: the social costs of administering the theft prohibition with respect to the relevant class of goods do not exceed the social gains that will result from doing so. Or more explicitly: it assumes that enforcement costs are zero, which in turn restricts the social cost-benefit tradeoff to a comparison of the thief's gains against the owner's losses, as adjusted by any transaction-cost gain or loss relative to a market transaction involving the same parties. If the costs of administering the theft prohibition were sufficiently exorbitant, then there may be—almost surely will be—a broader class of circumstances where it is worthwhile to suffer the indirect costs of tolerating theft in the form of depressed investment and consumption. The contingent economic case against theft allows the costs of enforcement to exceed zero and, setting those costs against the investment and consumption gains that result from security of property rights, can now anticipate (correctly) a far broader range of circumstances where theft is efficient. Simply removing the implicit assumption of zero enforcement costs converts efficient theft from an exceptional to an unexceptional case.

The Demsetz principle provides the basic kernel—but, as will be shown, a kernel that ultimately will be substantially modified—for developing an amoral non-circular principle by which to account for historical, geographic and other field-specific variation in the composition of the set of creative goods subject to the theft prohibition. The basic tradeoff between marginal investment gains and marginal administrative costs immediately appears to have some explanatory force. It can plausibly explain why norms against literary imitation, and the premium placed on the originality of literary

justifying a finding of substantial similarity”). *But see* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) (declining to recognize a *de minimis* exemption for copyright infringement in cases of digital sampling).

⁴⁵ See Harold Demsetz, *Toward a Theory of Property Rights*, PAPERS AND PROCEEDINGS OF THE AMER. ECON. REV. (1967).

expression, developed roughly at the advent of a mass market for literary consumption.⁴⁶ It can plausibly explain why Congress formally extended copyright to software programs in 1980⁴⁷ (and why the Supreme Court extended patent protection to software the following year⁴⁸) roughly as a substantial market for prepackaged software began to develop. And it can plausibly explain why federal copyright protection was only extended to sound recordings as late as 1972: prior to that time, investment gains were high but so were copying costs given the limitations of existing copying technology, thereby making legal protections largely superfluous.

Using the Demsetz framework, these changes in application of the theft prohibition over creative goods can be explained without recourse to “just so” explanations based on *ad hoc* changes in intrinsic preferences for holding creative goods privately or collectively. Rather, any deviation from complete application of the theft prohibition reflects the fact that either (i) the relevant asset does not have sufficient economic value to warrant incurring the necessary enforcement costs, or (ii) enforcement costs are sufficiently high that it is not cost-beneficial to maintain property rights over the relevant asset. So long as maintaining legal and/or moral constraints on uncompensated copying are costly activities, it follows that these constraints will expand and contract as a function of enforcement costs and asset values consistent with the Demsetz thesis. Hence, moral imperatives that “prohibit” or stigmatize private property as “selfish”, or conversely, “prohibit” or stigmatize unconsented usage as “thievery”, are external symptoms of an underlying economic logic that determines the set of goods subject to the theft prohibition in order to maximize investment gains net of administrative and other social costs. Where markets are small and rights-administration technologies are expensive, societies view or even reward uncompensated transfers as morally innocuous or laudable; where markets expand and rights-administration technologies become cheaper, societies institute property rights and punish uncompensated transfers of newly-protected assets.

Changes in the scope of the theft prohibition, which would otherwise appear to be cultural or historical accidents, can now be derived from a single wealth-maximization principle, which in turn is reduced to a function of the relationship between two variables. That is an elegant theoretical construction. But is it true in fact? A good deal of empirical evidence in various real property settings is compatible with the Demsetz thesis.⁴⁹ I will now consider whether this principle can account for changes in the composition of the set of creative goods subject to the theft prohibition, as that prohibition is and has been implemented through the formal and informal devices that make up transaction structures in creative goods markets.

⁴⁶ See MALLON, *supra* note 24, at 3-4 (noting that concern with plagiarism only becomes prominent in English literature roughly around the time that writing became a profession).

⁴⁷ 17 U.S.C. §§ 101, 117. For a description of Congress’ action, see *Apple Computer, Inc. v. Formula Intern., Inc.*, 725 F.2d 521 (9th Cir. 1984).

⁴⁸ This is usually dated from the Supreme Court’s decision in *Diamond v. Diehr*, 450 U.S. 175 (1981).

⁴⁹ For a review of the evidence, see Louis De Alessi, *Gains from Private Property: The Empirical Evidence*, in *PROPERTY RIGHTS: COOPERATION, CONFLICT AND LAW* (ed. Terry L. Anderson and Fred S. McChesney 2003).

III. DO TRANSACTION STRUCTURES EVOLVE TOWARD EFFICIENCY?

In this Part, I proceed in two steps. First, I describe an alternative “power” approach that casts doubt on the optimistic thesis that the evolution of transaction structures in creative goods markets tends toward social efficiency. Second, I adopt that alternative approach but modify it to reformulate a qualified efficiency account of the evolution of transaction structures in creative goods markets. The result is an analytical framework that (i) eliminates any accidental account of the evolution of transaction structures as a positive matter, and (ii) mitigates any accidental account of the efficiency of evolved transaction structures as a normative matter. This framework can account for the non-uniform application of the theft prohibition over creative goods and identify, at some reasonable approximation, the circumstances under which that application is or is not likely to be socially efficient.

A. *The “Power” Approach*

The Demsetz principle can be described as a social evolutionary account of changes in the scope of application of the theft prohibition over the total set of tangible and intangible goods. Like its biological equivalent, this evolutionary theory suggests that transaction structures evolve to maximize social efficiency construed as wealth maximization—the economic equivalent of genetic fitness. But there the analogy starts to fall apart. Biological evolution exploits genetic transmission as the mechanism by which traits are transmitted across generations and selection effects as the mechanism by which the most well-adapted traits displace less well-adapted traits. The theory of efficient property rights evolution lacks any corresponding mechanism that necessarily yields efficient outcomes (or put differently, necessarily punishes inefficient outcomes). Moreover, if we consider the mechanism by which transaction structures are established and administered in fact, it would appear that the resulting structures are *unlikely* to promote collective welfare. That is because interested parties will attempt to influence the evolutionary development of those transaction structures. Any misalignment between individual payoff-maximization and social payoff-maximization in the case of the parties with the greatest influence capacities implies that the resulting transaction structure will favor the private interest at the expense of the public interest, resulting in a socially inefficient outcome. Operationalizing the Demsetz thesis would appear to undermine it or at least threaten to do so.

It is precisely this failing that has stalled any substantial further refinement—at least as a theoretical matter—of the Demsetz theory of efficient formation of property rights.⁵⁰ As Saul Levmore has observed, any property rights arrangement can support an optimistic story of efficient rights formation or a pessimistic story of inefficient rights manipulation.⁵¹ To be sure, the mere possibility of rent-seeking distortions away from efficient transaction structures does not rule out the optimistic story in any particular instance. Moreover, there is no intrinsic reason to believe that private rent-seeking

⁵⁰ Most of the ensuing literature is empirical in nature. For a review of subsequent theoretical refinements, see THRAINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 247-81 (1990).

⁵¹ See Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEG. STUD. S421(2002).

interests would be misaligned with social wealth-maximization objectives. The most powerful parties with the greatest influence capacities should rationally pursue interests compatible with collective wealth-maximization: the largest share of a larger social pie exceeds the largest share of a smaller social pie. But that is not necessarily the case. Efficient changes to transaction structures will be blocked whenever any sufficiently powerful stakeholder anticipates that its proportional share of the total social product will decline sufficiently such that its absolute portion falls. Powerful parties may therefore oppose collectively wealth-maximizing changes that bolster existing property rights protections if they feared that doing so would reduce the absolute value of their individual holdings. Hence, the consistent opposition of the Bloomberg Corporation, the world's leading provider of financial data, to extending intellectual property protection to databases⁵² may bolster its dominant market position by maintaining a zero cost for its principal input, which in turn may constrain entry by independent news suppliers that cannot match Bloomberg's distribution network.⁵³ Conversely, powerful parties may support collectively wealth-depleting changes that strengthen existing property rights protections if they believed that doing so would raise the absolute value of their individual holdings. Hence, as may be illustrated by the Sonny Bony Copyright Term Extension Act of 1998, entertainment and media interests may pursue legislation to extend the copyright term retroactively even if doing so maintains a tax on consumers and less well-endowed rivals without any plausible social gain in creation incentives.

Recall the original objective: is it possible to anticipate systematically changes in the composition of the set of creative goods over which the theft prohibition applies? That is: is it possible to explain changes in the application of the theft prohibition without *ad hoc* reference to case-specific cultural or historical factors? Even if we accept the rent-seeking critique of the Demsetz thesis, we have still made an advance. If (i) we tie changes in transaction structures to changes in the distribution of influence capacities and (ii) we tie efforts to influence transaction structures to private interests in payoff maximization, then we can anticipate changes in the scope of application of the theft prohibition, and, with a certain degree of approximation, can specify the direction of those changes away from a (provisional) efficiency baseline.⁵⁴ Any transaction structure

⁵² The lack of copyright protection for databases was made clear in *Feist Publications v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991) (holding that data is not subject to copyright protection but sufficiently creative selection and arrangement of data may be entitled to protection). For an example of Bloomberg's lobbying position, see DATABASE AND COLLECTIONS OF INFORMATION MISAPPROPRIATIONS: JOINT HEARING ON H.R. 3261 BEFORE THE SUBCOMM. ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY OF THE HOUSE COMM. ON THE JUDICIARY AND THE SUBCOMM. ON COMMERCE, TRADE AND CONSUMER PROT. OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 108TH CONG. 94-96 (2003).

⁵³ Perhaps not coincidentally, the financial data market is dominated by a duopoly consisting of Bloomberg and Thomson Reuters. See Ian Austen, *A Name to Herald Its Merger: Thomson Reuters*, N.Y. TIMES, Apr. 17, 2008 (stating that Bloomberg and Reuters-Thomson each control about a third of the worldwide market in financial information services). All other competitors have less than 5% market share. See *US, Canadian-British firms dominate financial news market* (AFP, March 2008), avail. at www.bnet.com. These examples are part of a larger pattern: as I have argued elsewhere, weak property rights can bolster the market position of large incumbents that have superior competencies in capital-intensive portions of the supply chain. See Jonathan M. Barnett, *Intellectual Property as a Law of Organization*, S. CAL. L. REV. (forthcoming 2011).

⁵⁴ This is a "provisional" efficiency baseline because, while it applies the standard tradeoff between static and dynamic efficiencies that drives economic analysis of intellectual property, it assumes that an efficient copyright system would weigh equally the static and other inefficiencies of stronger copyright

will change to the extent it promotes the private interests of the parties that have the strongest capacities and incentives to influence the existing transaction structure. This eliminates accidental explanation as a positive matter but preserves it as a normative matter. That is: we can understand how transactional evolution occurs but we have no confidence that it will move toward collectively wealth-maximizing outcomes except by happenstance. Observed transaction structures may occasionally or sometimes coincide with the collective interest in wealth-maximization, but, where that is the case, that *is* accidental. I will now explore whether it is possible to make further progress on the latter point.

B. A *Qualified Efficiency Thesis*

Any governing transaction structure will be efficient if, relative to all alternative transaction structures that tolerate uncompensated transfers to a greater or lesser degree, it maximizes the social wealth generated by creative output, net of the costs of administering and enforcing the governing transaction structure—again, constituted by informal norms, formal property interests, and tort and criminal causes of action against violation of those interests—under which that output is produced and distributed.⁵⁵ The standard rent-seeking critique—which implicitly drives a good deal of contemporary copyright scholarship—argues that that outcome is unlikely except by fortuitous accident. In this Section, I revisit that proposition within roughly the same framework that derives transaction structures from rent-seeking and other influence activities by self-interested constituencies. To do so, I assess (i) the incentives and/or capacities of stylized categories of interested parties to influence (whether directly or indirectly and whether intentionally or inadvertently) the transaction structures that govern creative goods markets and (ii) the extent to which those parties are likely to promote outcomes that deviate from (provisionally) efficient transaction structures. The result is perhaps surprising: transaction structures for creative goods markets that are reasonably efficient, fair and stable tend to tolerate substantial levels of theft.

1. What's Special About Creative Goods

Designing the transactional structure for a creative goods market consistent with social efficiency is a complex exercise in light of two peculiar characteristics that generally do not obtain in tangible goods settings. First, because creative goods are nonrival (i.e., I can read *War and Peace* without preventing you from ever doing so but, if I eat the last scoop of ice cream, there is none left for you), any price assessed for consuming those goods in excess of marginal cost (often close to zero in the digital setting) imposes a

(namely, deadweight losses and transaction costs) against the dynamic inefficiencies of weaker copyright (namely, weaker creation incentives).

⁵⁵ Consistent with efficiency analysis, this standard ignores distributional considerations. As I will argue subsequently, however, certain peculiar characteristics of creative goods market suggest that the same influence processes that tend to promote efficient outcomes will necessarily take into account—at least partially—certain distributional considerations.

deadweight loss that is inefficient from a static perspective.⁵⁶ Hence any efficient transaction structure in a creative goods market imposes some constraints on property rights in order to minimize that social loss. Second, because creative production is usually a cumulative process consisting of an unfolding sequence of first-mover and *n*-mover creations, an efficient transaction structure imposes some constraint on the property rights of “first-mover” producers in order to promote creation by “*n*-mover” producers. Weaker property rights—which legalize certain forms of unconsented appropriation that would otherwise be denoted as theft—promote these dynamic efficiency gains by lowering the transaction costs borne by *n*-mover producers.⁵⁷

These two defining characteristics—each of which is largely peculiar to intangible goods settings⁵⁸—yield a single implication of considerable importance. *It is unlikely that a regime of unconstrained property rights in creative goods that permitted no trespass at any time and over any product attribute by users or n-mover producers would maximize the net social gains generated by creative production.* Together deadweight losses and transaction costs cap the efficient range of informal and formal constraints on the uncompensated usage of creative goods. Some positive level of tolerated theft is an essential component of any transaction structure that maximizes the social wealth generated by creative production. That suggests that the otherwise anomalous shortfalls in the property rights coverage provided by the Copyright Act, as well as the various degrees of incompleteness that characterize application of the theft prohibition in creative goods markets in general, may promote, rather than deviate from, the pursuit of efficiency.

2. Propertization Biases

Rough economic intuitions anticipate that efficient transaction structures for creative goods markets will exhibit an intermediate form that tolerates some but not all forms of unconsented appropriation. It is widely observed, however, that economic analysis has insufficient data and processing tools by which to implement that intuition—which, for our purposes, would entail specifying the efficient scope of the theft prohibition in any

⁵⁶ Deadweight loss refers to the welfare loss attributable to blocked transfers to users who would have been willing to pay a price at least equal to the variable cost of producing and delivering an additional unit of the relevant product.

⁵⁷ Note that, contrary to standard formulations, I do not include input costs among the social costs of increased copyright protection; that is because input costs only have efficiency (as distinguished from distributive) implications to the extent transaction costs block efficient contracting between first-mover and *n*-mover producers. Suppose that a second-mover producer were more efficient in cultivating the copyrighted asset held by a first-mover producer. In that case, the first-mover producer would rationally grant access to the second-mover producer subject to a contractual division of the joint surplus. But this outcome will not be realized where transaction costs are too high, which is often the case in the innovation context due to the difficulty in specifying performance and other contractual terms. For the leading discussion of transaction-cost obstacles to subsequent innovation (in the patent context), see Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29 (1991)

⁵⁸ A partial exception is water, mineral assets, and other “floating” resources: like land, these are rivalrous in consumption; however, like intangible goods, these have certain cumulative production properties that can frustrate negotiation among holders of different portions of the same resource. Not coincidentally, property rights over these resources are often more constrained than property rights in land and other tangible goods.

creative goods market.⁵⁹ In contrast to the real property rights context, there is simply no unqualified economic case for—or against—copyright (or for or against greater or lesser levels of positive copyright protection). The power approach provides an imperfect but meaningful detour around this informational obstacle. Even without taking any view as to the efficient transaction structure for any given creative goods market, the outside observer can consider the extent to which the influence processes by which transaction structures are formally and informally determined in practice will take into account the socially relevant interests of the heterogeneous pool of affected parties. For this purpose, it is necessary to identify (i) each affected group’s “proPERTIZATION bias”—that is, the direction in which it would self-interestedly prefer transaction structures to deviate from an efficient baseline of constrained but positive levels of property rights coverage and (ii) each affected group’s “influence capacities”—that is, its capacity to take actions that influence (whether directly or indirectly and whether intentionally or inadvertently) transaction structures consistent with its proPERTIZATION bias. Any resulting transaction structure will reflect the total sum of proPERTIZATION biases as weighted by each affected group’s influence capacities.

Broadly speaking, we can distinguish between two groups that will have divergent proPERTIZATION biases. This classification derives from a basic principle. Any party will favor transaction structures that provide stronger constraints on uncompensated transfers—a *positive proPERTIZATION bias*—as a positive function of the extent to which that party is a net producer over time of the relevant pool of creative goods, which then enhances its pricing power.⁶⁰ Conversely, any party will have the opposite interest—a *negative proPERTIZATION bias*—to the extent that it is a net user over time of those goods, which minimizes its consumption costs. This divergence of interests tracks the standard tradeoff in the political marketplace between competing interest groups over taxes and subsidies: any incremental expansion in property rights is equivalent to a tax on usage and a subsidy for production; it is therefore resisted by net users and promoted by net producers. Those underlying interests provide the basis for anticipating the direction in which each “influence group” will attempt to pull transaction structures away from an efficiency baseline that trades off the interests of users and *n*-mover producers (who favor

⁵⁹ Consensus on this point is remarkably broad. See, e.g., WILLIAM M. LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 10 (2003) (noting “the degree to which economic analysis of intellectual property remains inconclusive, if not indeterminate”); Adam B. Jaffe, *The U.S. Patent System in Transition: Policy Innovation and the Innovation Process*, 29 RES. POLICY 531 (2000) (stating that “robust conclusions regarding the empirical consequences for technological innovation of changes in patent policy are few”); Frank H. Easterbrook, *Who Decides the Extent of Rights in Intellectual Property?*, in DIANE LEENHEER ZIMMERMAN & ROCHELLE COOPER DREYFUSS (eds.), *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 405-06 (2001) (stating that “we know so little about the effects of our current intellectual property regime on the production and use of traditional intellectual property that it is silly to suppose that we have information essential to prescribe new regimes for new kinds of intellectual property” and that the “best academic students of the subject disclaim knowledge” as to the optimal strength of intellectual-property protection).

⁶⁰ By “net producer”, I include throughout distributors and other entities that are net holders of creative goods. This corresponds to the media interests that predominate in commercial entertainment markets, the most important application (economically speaking) of the copyright laws outside software. Without these entities (and without an incentive structure to motivate required investments by these entities), the large fixed capital investments required to support the existing infrastructure for content distribution and delivery would be difficult to finance privately.

fewer copying constraints) against the social costs borne by first-mover producers (who favor more).

a. Net Users

Parties that tend to be net users will rationally invest resources in promoting transaction structures that are tolerant of theft—again, defined as uncompensated usage of creative goods. Or alternatively, net users will rationally invest resources in evading transaction structures that are intolerant of theft. Through either mode of action, these parties will effectively *underdemand* constraints on unconsented appropriation from a social perspective. That is because net users only take into account the deadweight losses from supracompetitive constraints on creative output without taking into account the corresponding disincentives on producers (and, more importantly from a practical perspective, distributors⁶¹), who cannot recover fixed costs under a free appropriation regime.⁶² Relative to a disinterested social planner, net users will promote (or, more precisely, will take actions that effectively yield) transaction structures that are inefficient to the extent that increasing constraints on unconsented usage would generate social benefits in the form of increased creative output in excess of social costs in the form of depressed consumption and improvement.⁶³ This economic motive can explain why net-user populations—whether college students that consume pirated music or low-end fashion designers that imitate high-end styles—tend to adopt “inverted” moral norms that immunize or even encourage and glamorize borrowing practices. It also explains why firms that sell goods and services that facilitate the uncompensated use of creative goods—hardware manufacturers or internet intermediaries (e.g., Google/YouTube)—promote and endorse those norms. As Apple illustrated in a controversial 2001 ad campaign (which exhorted users to purchase Apple hardware in order to “Rip, Mix, Burn”), these entities rationally promote unconsented replication and distribution of copyrighted content. The reason is simple: increased opportunities for theft lower the price of content available to users and increase demand for the theft technologies by which to obtain, consume and disseminate that content.

⁶¹ The copyright literature often ignores the high fixed costs borne by distributors in capital-intensive cultural markets. On a risk-adjusted basis, these costs are magnified considerably given the stochastic and winner-take-all nature of creative markets (that is, consumer demand is unpredictable and virtually complete product failure is the most common outcome). On the importance of risk in understanding innovation markets and the demand for intellectual property protection, see Jonathan M. Barnett, Gilles Grolleau & Sana El Harbi, *The Fashion Lottery: Cooperative Innovation in Stochastic Markets*, 39 J. LEG. STUD. 159 (2010).

⁶² Actually net users’ underproportionization bias is even more distorted. They self-interestedly prefer zero pricing for all goods, which does not even permit recovery of variable costs. For simplicity, this can be safely ignored in the digital context, however, where variable costs approach zero.

⁶³ As I have sought to emphasize throughout, net users’ can “promote” transaction structures both explicitly, by taking formal action in legislative and judicial venues, and implicitly, by evading or ignoring existing moral or legal constraints on unauthorized usage of creative goods. The latter action does not require overcoming the conventional collective-action obstacles to political-economic influence by dispersed interests. For further discussion of this point, see *infra* note 71 and accompanying text.

b. Net Producers

Parties that tend to be net producers will rationally invest resources to promote and enforce transaction structures that are intolerant of theft. These parties will *overdemand* constraints on imitation from a social perspective. That is because they only take into account the returns from supracompetitive pricing without taking into account the deadweight losses borne by users and the transaction costs borne by second-mover producers. Relative to a disinterested social planner, net producers will promote transaction structures that are inefficient to the extent that relaxing constraints on unconsented usage would generate social benefits in the form of increased consumption and improvement in excess of social costs in the form of reduced creative output. Hence, highly original producers that rely little on the creative inputs of other entities will invest resources in promoting and enforcing norms and laws that block imitation even if doing so generates a net social loss relative to some weaker form of protection. This explains why leading classical composers (net producers) led lobbying efforts in the late 18th and early 19th centuries to extend copyright protection in England, France, Germany and other European jurisdictions to musical compositions⁶⁴ while, a few decades later in the early 20th century, popular composers (and, more typically, their publisher-assignees) battled with player piano companies and phonograph manufacturers (allied net users) over the extension of U.S. copyright to “mechanical reproductions” of copyrighted musical compositions.⁶⁵ Today high-end fashion designers that tend to originate new fashion trends (net producers) lead the lobbying effort for proposed legislation that would explicitly extend copyright protection to fashion designs, while the same effort tends to be resisted by other designers and, importantly, retailers that tend to imitate popular trends once they have been established (net users).⁶⁶

3. Influence Capacities

Standard discussions of the political-economic and other influence processes in copyright-protected markets state that copyright legislation is promoted by large media interests that have a private interest in socially excessive protection for creative works.⁶⁷

⁶⁴ See F. M. SCHERER, *QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES* 175-78 (2004).

⁶⁵ On this historical episode, see JESSICA LITMAN, *DIGITAL COPYRIGHT* 42-45 (2006). Composers were initially unsuccessful in this campaign: in 1908, the Supreme Court rejected the application of copyright to the perforated rolls used in player pianos. See *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1908). However, Congress overturned the decision a year later by extending copyright over musical composition to all forms of mechanical reproduction; however, in a compromise, this copyright was made subject to a compulsory license triggered by the first authorized mechanical reproduction. For further discussion, see STATEMENT OF MARYBETH PETERS, *THE REGISTER OF COPYRIGHTS BEFORE THE SUBCOMMITTEE ON COURTS, THE INTERNET AND INTELLECTUAL PROPERTY OF THE HOUSE COMMITTEE ON THE JUDICIARY*, March 11, 2004, available at <http://www.copyright.gov/docs/regstat031104.html>.

⁶⁶ On the lobbying history for and against intellectual property protections for fashion designs, see Barnett et al., *supra* note 61. It is worthwhile noting that Wal-Mart, the leading national retailer in the U.S. market, was the *defendant* in the leading Supreme Court precedent on the application of trade dress to fashion designs, *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000).

⁶⁷ For a review of these arguments, see Engelbrekt, *supra* note 13.

That tracks a standard assumption of public choice analysis, which holds that the most well-organized and concentrated group of parties that have an interest in any particular legal outcome will have the greatest ability to enforce that outcome through lobbying actions.⁶⁸ Consistent with that proposition, large media interests, who would appear to be net producers through their large “copyright estates” that limit reliance on outside inputs⁶⁹, will exercise disproportionate influence over legal outcomes while the residual mass of individual users will be powerless to take any countervailing action given the obstacles to collective action posed by large numbers and small individual stakes. If that were the end of the story, it would follow that the lobbying and enforcement processes by which transaction structures are determined in creative goods markets would tend to yield chronically excessive constraints on uncompensated usage of creative goods. That is, the market would tolerate too little theft. The Demsetz efficiency story would be reduced to a pleasant economic fable.

But it is not the end of the story. The standard account (and the standard applications of public choice theory that it tracks) makes a crucial overstatement. It assumes that the dispersed mass of net users have little power by which to counteract the overprotection efforts of net producers. This fails to apply the power approach across the full range of participants in the lobbying and enforcement processes that in the aggregate determine transaction structures in creative goods markets.⁷⁰ And it does so because it limits the tools of influence to the formal tools that can be deployed by organized interests to directly influence legislative, judicial and agency decisionmaking. It is true that net users face formidable collective action obstacles to participating

⁶⁸ For the original source, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). As I note shortly below, even the earliest formal developments of Olson’s intuitions complicated this assumption. See *infra* note 70. Nonetheless it has persisted in standard *applications* of public choice theory, which focus disproportionately on the political influence of small groups.

⁶⁹ That assumption is not free from doubt. There are two reasons. First, as evidenced by the similarity of movies released simultaneously by competing studios (which tracks similar patterns in other creative industries), even the largest content holders may have a long-term interest in nonmaximal levels of intellectual property coverage that enable limited borrowing from competitors. For an extended application of this logic to the fashion market, see Barnett et al., *supra* note 61. Second, in some European and Asian jurisdictions, rights holders are not as concentrated as in the U.S. market, in which case their comparative influence advantage relative to users is diminished. See Olivier Bomsel & Heritana Ranaivoson, *Decreasing Copyright Enforcement Costs: The Scope of a Graduated Response*, 6 REV. ECON. RES. ON COPYRIGHT ISSUES (2009). For sake of simplicity, I adopt this assumption in unqualified form in the discussion above. Relaxing the assumption would bolster my ultimate conclusion.

⁷⁰ For an exception to the conventional focus on the disproportionate power of concentrated interests in public choice theory, see NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* 53-97 (1996), who develops a “two-force” model that trades off majoritarian bias (which favors large unconcentrated interests) against minoritarian bias (which favors small concentrated interests) in the production of political outcomes. As Komesar notes, a multi-force model is more compatible with the full range of political outcomes, which often favor the majority interest or balance majority and minority interests. It is probably more accurate to state that the conventional focus on the disproportionate power of small groups is typical of conventional *applications* of public choice theory. Other prominent (and early) contributors to the public choice literature have given substantial weight to the ability of “politically weaker” constituencies to exert some influence over political outcomes. See, e.g., Gary Becker, *A Theory of Competition among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976), and, for a more extreme departure, see Donald Wittman, *Why Democracies Produce Efficient Results*, 97 J. POL. ECON. 1395 (1989).

effectively in the lobbying processes by which transaction structures are formally determined.⁷¹ But that ignores two basic facts: (i) certain well-organized and well-endowed constituencies that *can* overcome collective-action obstacles may have allied interests in promoting weak intellectual property coverage; and (ii) no collective action obstacle must be overcome—and, in the copyright setting, virtually no cost must be incurred—in order for a net user simply to ignore legal constraints on unconsented usage. Taking those two facts into account yields a simple and surprising implication: even assuming the standard collective-action problem that favors concentrated interests, the dispersed mass of net users are sometimes likely to have great *indirect* and *effective* influence over the informal and formal processes by which transaction structures in creative goods markets are determined.

a. Indirect Influence

Net users *indirectly* exert great influence over the formal processes by which transaction structures are determined insofar as the interests of net users align with the interests of the providers of copying and distribution technologies and services that facilitate uncompensated usage. This concentrated group of intermediaries and other providers of complementary goods and services that facilitate creative trespass therefore effectively represent the interests of dispersed users, who cannot otherwise overcome collective-action obstacles to organizing effective formal representation. As uncompensated usage increases, so too does demand for the technologies and services that are required to engage in those practices; hence, the holders of those technologies and services have an economic interest in undertaking changes in the transaction structure in order to lower users' liability for unconsented usage of creative goods.⁷²

Both present and past behavior in lobbying and litigation over copyright law conforms to this pattern. Today Google (and its subsidiary, YouTube) and other internet intermediaries litigate against content-heavy media companies in the ongoing dispute over the extent to which internet intermediaries can be held liable secondarily for copyright infringement by individual users. As a result of the latest judicial interpretation of the Digital Millennium Copyright Act of 1998, intermediaries such as YouTube and other websites are now largely protected from secondary liability for copyright infringement so long as they comply with certain takedown procedures and other procedural requirements set forth in a statutory safe harbor.⁷³ Just as dramatically, Google has singlehandedly altered the transactional structure in book publishing—the

⁷¹ The recent success by the Pirates' Party in garnering 7% of the vote in Swedish elections for the European Union parliament challenges this assumption. See Jack Schofield, Sweden's Pirate Party Wins EU Seat, posted June 8, 2009, avail. at www.guardian.co.uk. Even setting aside what may be an idiosyncratic case, it is worth noting that end-users' interests have historically been represented in the U.S. legislative process to some extent by universities, library associations and broadcasting interests.

⁷² For similar observations, see Bomsel & Ranaivoson, *supra* note 69 (noting that all intermediate participants in the vertical copyright chain have an interest in facilitating "free-riding" by end-users).

⁷³ See ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION ACT, which is part of the DIGITAL MILLENNIUM COPYRIGHT ACT, Title II, *codified at* 17 U.S.C. §512. For the most recent judicial decision in this ongoing battle, see *Viacom Int'l Inc. et al. v. YouTube Inc. et al.* (S.D.N.Y., June 23, 2010) (granting summary judgment to defendant YouTube under safe harbor provision for secondary liability for user infringement of copyright material, as set forth in the Digital Millennium Copyright Act).

historical core of copyright—by providing access to millions of copyrighted books through “Google Books” and then engineering in 2010 a settlement with book publishers and author representatives, who conceded what would seem to have been strong copyright infringement claims.⁷⁴ But Google’s override of authors’ ability to control the use of published content is hardly a novel action on the part of a well-resourced intermediary with an economic interest in minimizing the price of creative content. In the late 19th-century, some U.S. publishers opposed extension of copyright protection to foreign authors because it would inflate the price of a critical input—namely, the best-selling works of English authors.⁷⁵ And in the early 20th-century, broadcasters, piano roll companies, and phonograph manufacturers opposed legislation that would extend and/or bolster composers’ (or, more typically, publisher-assignees’) copyright to mechanical reproductions and public performances of musical compositions.⁷⁶ Examples could be multiplied but the point should be clear. Far from being helpless, consumers have often had powerful allies in the formal lawmaking process.

b. Effective Influence

An early antecedent of modern public choice theory defined influence (or “pressure”) mechanisms in expansive terms: “Pressure is broad enough to include all forms of . . . group influence . . . from battle and riot to abstract reasoning and sensitive morality”.⁷⁷ Individual end-users can exert influence as an effective matter by simply ignoring copyright constraints on unconsented usage. In the aggregate, those individual actions—which are virtually costless under typical enforcement conditions and do not require coordination with other users—impose enforcement costs that can overwhelm the formal laws that otherwise protect copyright holders against unconsented use. Reasonably excluding the imposition of infinite or draconian sanctions⁷⁸, the sheer number of

⁷⁴ In slightly more detail, the settlement waives the publishers’ and authors’ rights to sue Google for copyright infringement with respect to certain usage of copyrighted material distributed by Google Books, subject (among other things) to an “opt-out” right available to any copyright holder. The settlement was granted preliminary approval by a federal district court but is still pending final judicial review. For the full text of the settlement agreement, see AMENDED SETTLEMENT AGREEMENT AMONG THE AUTHORS GUILD, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., ET AL, AND GOOGLE INC., available at <http://books.google.com/googlebooks/agreement/>.

⁷⁵ See PAULL, *supra* note 1, at 58-59. It might be inquired how publishers could earn profits on works that were freely available for competitors to copy. The answer appears to be a soft form of cartelization: dominant book publishers entered into contracts with English authors to secure copies of a new work and respected the first publisher’s rights as a matter of industry custom, enforced by retaliation and threats of predatory pricing. See B. Zorina Khan, *An Economic History of Copyright in Europe and the United States*, EH.NET ENCYCLOPEDIA (ed. Robert Whaples, March 16, 2008), available at <http://eh.net/encyclopedia/article/khan.copyright>.

⁷⁶ See *supra* note 65.

⁷⁷ See ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* 258-59 (1908). In a recent contribution, Profs. Sonia Katyal and Eduardo Penalver adopt a similarly broad understanding of the means by which political outcomes can be influenced, focusing on instances where disobedience of property rights results in a change in political outcomes. See SONIA K. KATYAL & EDUARDO MOISES PENALVER, *PROPERTY OUTLAWS* (2010).

⁷⁸ Profs. Olivier Bomsel and Heritana Ranaivoson astutely observe that mass infringement necessitates large penalties to maintain rational deterrence, which are in turn perceived as “unfair”. That is: fairness constraints preclude any sufficiently deterrent penalties when copyright infringement costs fall to

infringers renders individual enforcement unfeasible absent widespread compliance with a theft prohibition on the basis of some combination of internalized moral principles, social norms, or self-help technological measures. As current market conditions illustrate vividly, the result is a *de facto* reduction in copyright protection, a dramatic rise in uncompensated usage of creative goods, and a neutralization or inversion of norms against uncompensated usage. Even without any lobbying effort by end-users in the formal political-economic process, or any other collective effort by end-users, large media interests have chosen to forfeit large portions of their copyright estates to the public domain. Given the difficulties of enforcement against individual users (or against actual and potential rivals that supply or could supply users with misappropriated content), the shadow nominal price of uncompensated transfers constrains the effective pricing power of content holders that are formally entitled to a legal “monopoly” as a matter of copyright law.⁷⁹ (The same competitive pressures constrain content holders’ ability to use “digital rights management” technologies to interfere with users’ ability to copy and distribute.⁸⁰) In a world where the probabilistic legal penalty for user infringement is nominal, any positive price paid by users to listen to downloaded music is simply the acceptance of a bribe not to steal in exchange for convenience of use.

4. A Revised Political Economy of Theft

The standard account of the political economy of copyright markets—which tends to depict an unremitting tyranny of content holders over users—appears to be substantially inadequate. The preliminary analysis sketched above⁸¹ suggests a roughly equal, or at least not entirely unequal, allocation of influence capacities among two core populations that have dichotomous propertization biases relative to the social efficiency baseline. The unconcentrated pool of net users, who exert substantial informal influence through the aggregate effect of individual infringement actions, and the concentrated interests allied with net users, who have substantial and sometimes predominant formal influence, have strong capacities to influence transaction structures in content markets subject to

nominal levels (and/or enforcement costs rise to exorbitant levels). See Bomsel & Ranavoson, *supra* note 69, at 13. This is typical of attempts to enforce prohibitions against morally controversial victimless crimes (e.g., drug transactions): without a firmly established normative infrastructure to exert a deterrent force, the law must inherently incur politically infeasible costs in order to achieve full enforcement.

⁷⁹ This may explain why, even firms with relatively unique products, can not appear to demand positive subscription pricing from internet users. Leading examples are The New York Times (a leading news site, which provides access at no cost and has experienced poor success with positive pricing schemes) and Facebook (a leading social networking site, which provides access at no cost).

⁸⁰ A leading example of this phenomenon is the Apple iTunes platform, which initially used anti-copying restrictions but then obtained the agreement of the record labels to remove them. See Dawn C. Chmielewski, *iTunes embraces 3-tier pricing, will remove anti-copy software*, L.A. TIMES, Jan. 7, 2009. . . . An even broader example is the music CD industry, which makes no use of anti-copying restrictions. Not coincidentally, copying restrictions persist on DVDs and e-books, which do not face pirated markets that can offer illegal copies at comparable quality and ease of access.

⁸¹ For a more in-depth analysis of the ability of competing interests groups to exercise influence over specific formal venues for making copyright policy, see Engelbrekt, *supra* note 13. The analysis above is more general but places special emphasis on informal means of exercising political-economic influence. For the leading accounts in the legal literature on the political-economic forces behind copyright legislation, see LITMAN, *supra* note 65; Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987).

low-cost forms of digital replication and distribution. This is almost certainly true in today's market but has also been true in previous periods: consider Sony's defense of the VCR in its 1984 Supreme Court case against Hollywood studios (Sony won)⁸²; or, as noted earlier, consider the effort by a player piano manufacturer in a 1908 Supreme Court case to block the extension of copyright to perforated piano rolls (it won too).⁸³ The *Sony* decision is remarkable for its friendliness to infringement: virtually any provider of trespass technologies would pass its weak test for contributory infringement (as the four dissenting Justices noted).⁸⁴ Reflecting the influence exerted by net users even in the absence of any collective form of organization, the Court's majority decision even suggests that it is driven in part by reluctance to impose infringement sanctions on the copying practices of home users.⁸⁵ (Interestingly, the Court adds in a footnote its rejection of any automatic equivalence between the theft of physical goods and the unconsented usage of creative goods, precisely due to the nonrival nature of consumption in the latter case.⁸⁶)

If the distribution of influence capacities—again, construed broadly to include both formal and informal actions that influence the governing transaction structure as an effective matter—across the pool of net producers and net users is not especially skewed, then there may be reason to have some confidence that the formal and informal lobbying/counter-lobbying and enforcement/evasion processes by which transaction structures in creative goods market are determined will tend to yield outcomes that do not diverge substantially from the efficiency outcome anticipated by the Demsetz thesis. At the very least, there is no inherent reason to believe that creative goods markets systematically tend toward overproprertization. Given the substantial influence capacities of net users and allied interests, underproprertization is an equally plausible outcome: that is, the distribution of influence capacities may be skewed toward users and allied interests.⁸⁷ Most precisely, we can state as follows: absent any empirically-supported

⁸² See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

⁸³ See *supra* note 64 and accompanying text.

⁸⁴ The *Sony* decision held that a provider of technology that facilitated copyright infringement would be exempt from secondary liability so long as the technology was at least *theoretically* capable of substantial noninfringing uses. Writing on behalf of the dissent, Justice Blackmun noted: "Only the most unimaginative manufacturer would be unable to demonstrate that an image-duplicating product is 'capable' of substantial noninfringing uses." See *Sony Corp. of America*, 464 U.S. at 498. The weakness of this test led the Supreme Court in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) to craft an inducement theory in order to expand third-party providers' liability for contributory infringement.

⁸⁵ The Court states: "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home . . .". See *Sony Corp. of America*, 464 U.S. at 456.

⁸⁶ In rejecting an analogy between a jewel thief who wears but does not resell the stolen merchandise and "time-shifting" of a broadcast television show by a home viewer, the Court states: "Theft of a particular item of personal property of course may have commercial significance, for the thief deprives the owner of the right to sell that particular item to any individual. Time-shifting does not even remotely entail comparable consequences to the copyright owner." See *id.*, at 450 n.33.

⁸⁷ It is worth noting that *underproprertization* is the typical historical defect in property rights institutions in markets for land. See DOUGLAS NORTH & R. P. THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1973). As the authors document, the absence or deficiency of secure property rights in land is responsible for substantial drags on economic growth. Other authors have argued that those deficiencies result in social harms that fall disproportionately on the poor, who lack other mechanisms (notably, violence) by which to secure returns from land holdings. See DE SOTO, *supra* note

assumption concerning the differential distribution of influence capacities among net users and net producers (including allied interests), the distortion effects induced by the lobbying, enforcement and evasion processes by which transaction structures in creative goods markets are determined do not inherently tend to favor excessively severe or relaxed constraints on unauthorized usage. And if *that* is the case, then operationalizing the Demsetz story in the creative goods setting may often turn out to substantially confirm, rather than undermine, it. Moreover, where that story proves false, it may be because the expropriation threat posed by resource-poor users and allied resource-rich interests results in a theft prohibition that is too weak, not (as is commonly alleged in copyright-protected markets) too strong.

D. *Evaluation: The Social Utility of Theft*

A brief recapitulation of the sequence of argument is in order. I began with an observation that application of the theft prohibition to creative goods settings is “accidental”—that is, while the norm is a constitutive element of any stable system of public or private ordering, the composition of the set of creative goods over which it applies can appear to be the arbitrary product of cultural or historical accident. A broadly-applied political-economic analysis shows that the content of the theft prohibition can be filled out by reference to the influence capacities of affected parties. This power approach complements, rather than simply substitutes for, the Demsetz theory of efficient property rights formation. This theory is insufficient as a “stand alone” proposition because it does not specify a mechanism by which the theft prohibition changes in scope across markets and periods. Self-interested investments in promoting transaction structures (whether intentionally or inadvertently) that govern the production and distribution of creative goods provide a plausible mechanism. But this immediately casts doubt on the efficiency account insofar as interested parties seek to maximize individual shares of the total social product rather than the total social product itself. Assuming that changes in transaction structures are driven by self-interested influence actions, it follows that deviations from the social baseline in favor of net users (transaction structures that tolerate imitation) or net producers (transaction structures that constrain imitation) will be endemic.

But the key variable is *net* deviations from the efficiency baseline: that is, the transaction structure that results from the partially offsetting actions by differently-interested parties in the formal and informal influence processes by which that structure is continuously determined. In the best-case scenario, those actions are perfectly offsetting and the opportunistic efforts of net users and net producers result in a tacitly and/or explicitly negotiated social bargain that approximates the transaction structure that would have been chosen by a disinterested social planner. To be sure, that is not an assured outcome: the extent to which transaction structures evolve toward efficiency in any given creative goods market is a case-specific empirical question. But that question

4. As I have argued elsewhere, similar efficiency losses and regressive distributive effects obtain in technology markets: any deviation from complete patent coverage operates to the disadvantage of capital-constrained innovators who cannot independently finance the production and distribution functions required to reach market and, given expropriation risk, cannot contract with outside suppliers to implement those functions. See Barnett, *Intellectual Property as a Law of Organization*, *supra* note 53.

can nonetheless be addressed at some reasonable level of approximation by examining the existing balance of formal and informal influence capacities. This refined power approach achieves an advance beyond (i) merely descriptive “just so” stories that some societies “happen” to tolerate imitation more than others, (ii) purely naïve stories that societies deterministically generate socially efficient imitation norms, and (iii) purely cynical stories that societies deterministically generate socially inefficient imitation norms. While that is not a complete resolution, it is a considerable advance over all existing alternatives.

This approach delivers a further implication of broader importance that runs counter to intuitive views of the social value of trespass, theft and other uncompensated usage of privately-held assets. Namely: it suggests that, at least in creative goods markets⁸⁸, uncompensated transfers, or the threat thereof, play a critical role in driving transaction structures toward constrained levels of protection that roughly aggregate the competing interests of net users (who stand to gain from less protection) and net producers (who stand to gain from more). The threat of coerced redistribution compels the holders of creative goods to engage in limited forms of voluntary redistribution. More specifically: the threat of expropriation by net users (and allied vendors) compels net producers (and allied distributors)—who would otherwise exert disproportionate influence over the formal processes by which prevailing transaction structures are determined—to forfeit a portion of the joint surplus to users, who, in exchange, “accept” a transaction structure that imposes a tax on users in order to cover otherwise irrecoverable fixed creation and distribution costs.⁸⁹ That tacitly-compelled division of joint surplus—essentially, an implicit social bargain—yields both an efficiency gain insofar as it reduces the social costs inherent to consumption constraints in creative goods markets and a distributive gain to the extent there is a social interest in privileging user welfare.

Efficiency therefore is not inherently at odds with fairness in creative goods settings: that is, transaction structures that tend to be accepted by net users—who continuously pose a threat of mass noncompliance to content holders—will tend to be transaction structures that take into account those users’ interests by setting nonmaximal constraints on uncompensated transfers.⁹⁰ Speaking somewhat loosely, this is both a fair

⁸⁸ For a broader argument that trespass, theft and like action play a socially useful role (taking into account a diversity of economic and non-economic considerations) in influencing political outcomes in intellectual property contexts as well as a larger variety of settings, see Sonia K. Katyal & Eduardo Moises Penalver, *Property Outlaws*, 155 U. PENN. L. REV. 1095 (2007). The authors expand upon these arguments in a book-length treatment. See KATYAL & PENALVER, *supra* note 77; in particular, *see id.*, at 182 (arguing that “disobedience . . . may be essential to the health of the intellectual property system”).

⁸⁹ I am not supposing that users are hypothetically represented by some sort of collective entity, which could in turn bind users’ to any settlement. Rather, I am envisioning that users have some sort of intrinsic preference to obey the law and that this preference is then enhanced to the extent that the law is perceived to be legitimate, which is in turn a function of the law’s perceived fairness. This assumption is consistent with empirical inquiries into the extent to which individuals’ tendencies to comply with the law is driven by an inherent value placed on legal compliance and the perceived legitimacy of the law. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 178 (1990) (testing hypothesis that belief in the legitimacy and morality of the law promotes compliance and finding that both factors have significant independent effects as anticipated).

⁹⁰ In a different context, David Haddock has shown how, even in the absence of an interventionist state actor, equilibrium property rights arrangements will converge on a distribution that does not allocate

outcome to the extent any distributive weight is placed on net users' interests and an efficient outcome to the extent it precludes a market failure where net users freely seize the creative goods supplied by net producers (who, by anticipation, will redirect resources to other uses absent any alternative means by which to capture returns on investment in the production of those goods). This rough convergence of efficiency and fairness exploits the unique economic characteristics of creative goods markets, as a result of which efficiency demands some cap on asset holders' ability to regulate uncompensated usage.⁹¹ In those markets, "fair" transaction structures are likely to implement a socially efficient bargain that implements the inherent tradeoff between constraining deadweight loss and transaction costs (which favors less property, thereby benefiting net users) while preserving incentives for first-mover creation and distribution (which favor more, thereby benefiting net producers). Critically, reaching that fortuitous result may often depend on the fact that users (and the holders of complementary distribution and copying technologies) inherently pose a risk of mass trespass to the holders of creative assets.

CONCLUSION

The problem of theft stands at the heart of current discussions concerning the socially appropriate scope of the copyright system over the production and distribution of creative goods. Those discussions, which debate whether copyright should extend to various forms of unconsented usage in creative markets, are intensely normative, with each side using highly moralized language to impugn imitation as "stealing" from the fruits of others' labor or to stigmatize property-rights enforcement as nothing but "greedy" rent-seeking on the part of powerful large resource holders.⁹² But it is difficult to suppose compelling distributional arguments to favor the interests of producers over users, or vice versa, or the interests of professional artists over amateurs, or vice versa, or the interests

all property rights to the strongest party. This relies on a marginal analysis that takes into account the opportunity cost of violently defending property rights claims: the weaker party will initially forfeit property rights in order to avoid violence costs given its large remaining holdings but will later increase resistance as its holdings decrease and the opportunity costs of violence therefore fall as well; conversely, the stronger party will subsequently relax resistance as its holdings increase and the opportunity costs of violence therefore increase. See David D. Haddock, *Force, Threat, Negotiation: The Private Enforcement of Rights*, in *PROPERTY RIGHTS: COOPERATION, CONFLICT AND LAW* (ed. Terry L. Anderson and Fred S. McChesney 2003). The same marginal analysis is used in sophisticated public-choice models of the lobbying process, which anticipate that "non-dominant" groups can exert some influence over political outcomes as a result of diminishing marginal returns to political investment for the dominant group (whose gains are therefore diminishing) and increasing marginal returns to political investment for the non-dominant group (whose losses are therefore increasing). See Peltzman, *supra* note 70; Becker, *supra* note 70.

⁹¹ Interestingly, this suggests that gaps in copyright coverage can be viewed as a solution to a collective action problem among content holders. While it may be in all holders' interests to restrain property rights coverage in order to promote user compliance with copyright law in general, it is not in any individual holder's interest to unilaterally tolerate uncompensated use. Caps on the available level of copyright coverage align private behavior with the collective interest by binding all content holders to the same maximal level of possible enforcement, thereby avoiding the inferior outcome—namely, widespread user noncompliance—that might otherwise prevail.

⁹² For a similar observation, see KATYAL & PENALVER, *supra* note 77, at 180. For an extensive discussion of the rhetoric of copyright policy debates, see JESSICA REYMAN, *THE RHETORIC OF INTELLECTUAL PROPERTY: COPYRIGHT LAW AND THE REGULATION OF DIGITAL CULTURE* (2010).

of foreign authors over domestic authors, or vice versa, or the interests of technology firms over content firms, or vice versa, or the interests of artists over the owners of works of art, or vice versa, or the interests of concert-promotion firms over content-distribution firms, and so on.⁹³ The complexity is self-evident. The web of overlapping interests affected by changes in the transaction structures governing creative production appears to be too complex and fluid to support any obvious distributional preference (as illustrated by standard rhetoric to protect the reader or save the artist) or, even if any such preference could be identified, to anticipate the distributional effects in a consistent manner.⁹⁴

If that is the case, then existing forms of moralized argument reduce to self-interested positions in favor of various divisions of industry rents among affected constituencies and, as a result, make little contribution to determining the socially appropriate scope of the theft prohibition. Attempts to resolve this indeterminacy by recourse to economic models that pursue aggregate wealth-maximization irrespective of distributional effects have limited analytical yield. While *some* positive level of property-rights protection in creative goods markets is almost certainly warranted, and a complete extension of property rights protection would almost certainly be *unwarranted*, even otherwise firm adherents to economic analysis in other areas of the law recognize the absence of any empirical basis on which to operationalize that analysis in the form of a fully specified legal regime.⁹⁵

Bottom-up positive analysis of the lobbying and enforcement processes by which intellectual property rights, and the larger transaction structure in which those rights are embedded, evolve in creative markets can achieve progress where top-down moralized argument and economic design struggle to do so. Tying changes in copyright law to rent-seeking actions is a standard genre in copyright scholarship, which has amassed a

⁹³ For the most sustained treatment of distributive issues in copyright, see Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005), who explores the positive and negative effects of copyright on poorly financed creators as part of a more general concern with widely distributing opportunities for expression. That argument of course assumes that poorly-financed creators are the principal object of distributive concern in the copyright system; as suggested above, it appears that other plausible candidates could make a compelling case.

⁹⁴ It might be argued that there are distributive reasons to favor consumers over all other constituencies. While that is commonly asserted or implied in copyright scholarship, there does not appear to be any obvious reason why that should be the case: (i) creators are often poorer than consumers—consider artists and art buyers; and (ii) as noted previously, consumers (as net users) do not take into account the dynamic efficiency losses imposed by competitive pricing or even the static efficiency losses imposed by zero pricing. Nonetheless let's assume there *is* such a distributive interest. Even in that case, a distributional bias in favor of consumers does not yield any necessary and uniform implication that transaction structures should permit more copying. This can be illustrated preliminarily by the following historical example. Prior to the advent of copyright protection for musical compositions, classical composers concentrated their efforts on operatic productions, which allowed the composer to earn revenues on the first night's performance, after which the music would be freely copied and performed by others without compensation. After the advent of copyright protection, however, some composers shifted resources toward the production of smaller-scale "reductions" of operas and orchestral works, on which revenues could be earned through the sale of sheet music to a broader middle-class audience. The result: copyright protection induced composers to shift resources to a medium that was more accessible, a clear gain for end-users relative to the pre-copyright market. For the historical details, see SCHERER, *supra* note 64, at 180.

⁹⁵ See *supra* note 59.

valuable body of evidence on the process of copyright legislation that could be fruitfully integrated into, and enriched by, the new institutional economics and public choice frameworks for analyzing legal and other social institutions. But prior contributions in that vein may have moved too quickly toward normative conclusions that copyright laws must be too strong—that is, the theft prohibition is too broad—given the disproportionate influence of the powerful holders of copyright portfolios. That view suffers from two defects. First, as noted above, it focuses on only one of two possible errors: that is, it underestimates the influence capacities of net users and allied interests, which suggests that deviations from the social interest may tend as much toward underprotection as overprotection. Second, it defines “error” too broadly. As Neil Komesar emphasizes, institutional choice is always a comparative exercise that requires assessing alternatives within the *feasible* set of policy choices.⁹⁶ In a second-best world where policymakers operate under severe informational constraints, the lobbying and enforcement processes in the judicial and legislative arena may be the most efficient feasible means by which to aggregate information that influences the design of the formal transaction structures that govern creative production, which in turn are embedded within the larger normative structures that govern appropriation practices in those markets.

Perhaps rent-seeking, and the other types of formal and informal actions by which parties attempt to influence property rights allocations, deserve a better reputation.⁹⁷ What is in part an information aggregation process generates outcomes that inherently deviate in varying degrees from the (unknown) wealth-maximization baseline that would be determined by a disinterested social planner. Assuming that any socially efficient transaction structure must take into account the interests of net users and net producers, the extent of any such deviation is largely a function of the relative influence capacities—including the credible threat of mass expropriation—of constituencies with divergent interests in the transaction structures that govern any particular creative goods market. This process-oriented view of transaction structures—that is, a view that rigorously declines to make any substantive assumption as to the “proper” scope of legal and other protections against unauthorized usage—can exert explanatory force over what would otherwise appear to be the arbitrary application of the theft prohibition over creative production in various periods, regions and industries. If (i) changes in transaction structures are a function of privately-interested investments by affected parties in maximizing individual payoffs, (ii) socially efficient transaction structures must take into account the interests of the entire pool of differently-affected interests, and (iii) those differently-affected interests have roughly equivalent informal and formal capacities by which to make those influence investments, then changes in the scope of the theft prohibition in creative goods markets may not be arbitrary—or may not be entirely arbitrary—in a positive *or* normative sense. (For the positive proposition to hold, only the first condition must be met.) To the extent those conditions are satisfied (to be sure, not an easy task), then competing influence investments to further *private* interests will tend in the aggregate to push transaction structures toward outcomes that are consistent with the *social* interest; where those conditions are not satisfied, then the unequal

⁹⁶ See KOMESAR, *supra* note 70, at 6-7 (1996). As Komesar notes, comparative institutional analysis can be traced back (at least) to Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1 (1969).

⁹⁷ For an unusually favorable view of rent-seeking, see Wittman, *supra* note 70.

distribution of influence capacities will push transaction structures toward excessive or insufficient tolerance of creative theft. A crucial tool in leveling the distribution of influence capacities is the serious risk of mass trespass posed by net users. That corrects the inherent misalignment between the private interests of asset holders and the social interest in navigating the tradeoff between short-term and long-term inefficiencies that is the salient economic characteristic of intangible goods markets. To use an older terminology, exit gives voice⁹⁸: the meaningful prospect of mass trespass, as abetted by the suppliers of copying, editing and distribution technologies, promotes the reasonably efficient evolution of transaction structures for the production and distribution of creative goods.

⁹⁸ This refers to ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).