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UPDATING COPYRIGHT: CAPITALIZING ON DIGITAL OPPORTUNITIES

Jordan Call¹

“Digital theft is killing the music business,” proclaims MusicUnited.org in an online petition. “It is destroying jobs, opportunities and careers. Songwriters, artists, musicians and vocalists, retailers, distributors, labels and publishers are all at risk, as is the unique culture of American music itself.”² These are strong words, but after all, “digital theft” has become somewhat of an epidemic—the New York Times reports that as of 2010, 95 percent of downloaded music worldwide is pirated.³ It is hard not to sympathize with the plight of the artist or publisher. They are working hard to provide the public with culture and entertainment, but it seems that they have caught a terminal disease and are hemorrhaging at an alarming rate. That disease has been a direct result of the internet.

The internet allows for an unprecedented dissemination of information, as well as incredible means of connecting people worldwide. One would think that this would make the internet one of the best

1 Jordan Call is an English major, BYU class of 2013. He will be attending law school this fall, and is currently deciding where he will attend. He hopes to eventually enter legal academia. The author wishes to thank Rob Allen, Dan LeFevre, Kristen Danner, Bryson Weed, and Franny Djoukeng for their work on this paper. Also, many thanks to Brian Reed and Brooke Clason for their support throughout this process.

2 MUSIC UNITED FOR STRONG INTERNET COPYRIGHT, <http://www.musicunited.org/> (last visited Jan. 1, 2013).

3 Eric Pfanner, *Music Industry Counts the Cost of Piracy*, N. Y. TIMES (Jan. 21, 2010), http://www.nytimes.com/2010/01/22/business/global/22music.html?_r=0.

things that ever happened to an industry whose aim is essentially the creation and circulation of art and entertainment (or even more abstractly, ideas and their expression). While no one would deny that the internet has afforded many opportunities to artists and publishers, there seems to be a feeling that things were better before the pernicious internet became as “the Boston strangler is to the woman home alone.”⁷⁴

The internet has had an inestimable impact on how easily and frequently people engage in piracy. In most cases, there is little ambiguity regarding the illegality of the downloading, uploading, ripping, burning, and sharing that the modern consumer engages in; however, I submit that the laws preventing piracy and sharing are the actual source of societal detriment, rather than piracy and sharing themselves. These laws inhibit a potentially more efficient copyright system, and society could benefit by their revision. In this article, I will argue that the digital revolution, in its virtual freedom from scarcity, is being stunted by the stigma of current copyright regulations. I will demonstrate that revising the law to allow private reproduction and distribution in the case of digital media would do more good than harm to creative output, as well as advance the aims of copyright outlined in the Constitution. I will further demonstrate that in the absence of the vending of digital files, other economic factors will provide sufficient incentive to further the art and entertainment industries, while benefiting society through greater access and use.

I. LEGAL CONSIDERATIONS

To understand why current copyright law is stunting rather than encouraging progress from a digital perspective requires an under-

4 *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794 H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 97th Cong. (1982)* (statement of Jack Valenti, MPAA) (Jack Valenti’s famous analogy of what the VCR—with relatively tame copyright infringement capabilities compared to the world wide web—was to the “American film producer and the American public”).

standing of the state of copyright law and where it comes from, as well as an understanding of the nature of digital media and how it interacts with the law.

First, the law itself. Discussion of copyright is often focused on how to balance the rights of users with the rights of creators to find an optimal outcome.⁵ Unfortunately, it is usually the case that the expansion of one of these party's rights results in a reduction of the other's. If an artist were given complete power to restrict use, he or she would be able to exclusively capture the benefits of his or her work, thereby increasing the cost of access and limiting public use. Conversely, if every creative work were public domain, it would be difficult for the producer of the work to capitalize on his or her creation, despite widespread use. This issue may be framed in terms of "thick" or "thin" copyright.⁶ The former seeks to "maximize profits" for copyright holders.⁷ The latter, a "minimalist approach to copyright," attempts to maximize accessibility and public rights by providing copyright holders with as little protection as possible while still giving them incentive to create. Finding the appropriate point along the continuum is difficult and is central to the purpose of this paper. The search for this point must begin with certain ground-floor assumptions that depend on one's interpretation of the Copyright Clause of the Constitution, which gives Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁸

5 ROBERT A. GORMAN, COPYRIGHT LAW, 139-143 (2d ed. 2006).

6 Karen Coyle, Talk at the Library of Congress: The Technology of Rights: Digital Rights Management (Nov. 19, 2003), *available at* http://www.kcoyle.net/drm_basics1.html. (This dichotomy could also be set up as the tension between "fair use" and "creator rights," or the interests of the "public" versus "private," spheres, etc. For consistency's sake, this article will primarily describe the different parties as "consumers" and "producers/creators," the former referring to anyone and everyone who would benefit from the goods that the "producer/creator" either creates, supplies, or publishes).

7 *Id.*

8 U.S. CONST. art. I, § 8.

The “thick” and “thin” debate encapsulates the different approaches taken towards this passage. One political commentator captures the thinking behind the “thick” approach:

The Constitution says that the purpose of patents and copyright is to “promote the Progress of Science and useful Arts,” but the fact that the Constitution says this doesn’t mean it’s the *only* reason to grant patents and copyrights . . . creators have a moral right to profit from their works.⁹

Those who take this view argue that copyright is a moral right for creators. But, however valid this idea may seem, this argument puts words in the mouths of the framers of the Constitution. Talk of morality is conspicuously absent in the Copyright Clause.

The other interpretation maintains that copyright’s purpose is progress, rather than protecting a “Lockean” idea of property rights.¹⁰ This debate is admittedly ideological and largely subjective, but this assertion more closely follows the wording of the Constitution and is thus a more compelling argument. Oberholzer-Gee and Strumpf, professors of business at Harvard and Kansas University respectively, hold that “weaker copyright is unambiguously desirable if it does not lessen the incentives of artists and entertainment companies to produce new works.”¹¹ Jessica Litman maintains that the *use* of copyrighted works is what ultimately matters.¹² The Constitution’s stated reason for copyright—the progress of art and

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- 9 Kevin Drum, *Authors Have a Moral Right to Profit from Their Works*, MOTHER JONES BLOG (Feb. 15, 2012, 3:34 PM), <http://www.motherjones.com>.
- 10 *Gonna Do It Anyway, Even if It Doesn’t Pay*, THE ECONOMIST BLOG (Feb. 16, 2012, 6:37 PM), <http://www.economist.com/blogs/democracyinamerica/2012/02/copyright>.
- 11 Felix Oberholzer Gee, *File Sharing and Copyright*, INNOVATION POLICY AND THE ECON. (2010), available at <http://www.jstor.org/stable/10.1086/605852>.
- 12 Jessica D. Litman, *Lawful Personal Use* (Univ. of Mich. Program in Law and Econ. Archive: 2003-2009, Working Paper No. 62, 2006), available at <http://law.bepress.com/umichlwps-olin/art62/>.

science¹³—centers upon the benefit to society that such rights will provide. Thus, copyright becomes nothing more than a means to an end rather than an end in itself (the end being progress). This assertion will be foundational in this pursuit of the correct balance between creator rights and public rights.

Furthermore, if there is anything to be gained by changing copyright law, then the new policy must be in harmony with the Constitution. It is helpful to first identify the essential components of the Copyright Clause: “to *promote the Progress* of Science and useful Arts by securing for limited Times to Authors and Inventors *the exclusive Right* to their respective Writings and Discoveries” (emphasis added).¹⁴ The first and most vital element of this clause is that any policy that can claim to be Constitutional must necessarily “promote progress”—a deceptively simple phrase. The second essential element, the part about the “exclusive right” to a work, also requires interpretation. As a starting point, I offer a basic interpretation of this clause: copyright law must (1) encourage capable people to produce “useful” works by (2) granting and protecting rights as copyright holders that will (3) bring them reimbursement proportional to the perceived value that they create. Put more simply, copyright laws must give producers incentive to produce. Copyright law cannot merely be evaluated in terms of the effect that it will have on one party or another, but must necessarily assess the net effect on both the creators and the users, as well as American society at large. If the purpose of law is to benefit society, then a new legal balance of rights that increase or maximize the net benefit to society ought to be adopted as law.

The current legislative attitude towards copyright is best observed in the Copyright Act of 1976. This Act is the piece of legislation that has most directly governed copyright law for the last several decades. A marked improvement upon its predecessor, the Copyright

13 U.S. CONST. art. I, § 8.

14 *Id.* Much of the history of copyright law has dealt with the duration of copyright. *See, e.g.*, Copyright Term Extension Act, 17 U.S.C. § 108 (2006); *Eldred v. Ashcroft*, 537 U.S. 186 (2003); Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2006). The matter of duration is somewhat tangential to the current topic and thus will not be treated here.

Act of 1909,¹⁵ the 1976 Act clarified and codified the rights of copyright holders. It also protected certain public rights by including provisions for “fair use.” This Act established the general flavor of copyright law to this day, and subsequent legislation,¹⁶ amendments, and court decisions¹⁷ have generally fallen in line with this Constitutional interpretation.

At the heart of the Copyright Act lies its enumeration of the six exclusive rights granted to a copyright holder, which are:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) . . . to perform the copyrighted work publicly;
- (5) . . . to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.¹⁸

These rights are granted for a period of life plus 70 years (subject to renewal),¹⁹ and any violation of these rights during the term of copyright is termed “infringement.”²⁰ Authors’ rights are limited most significantly in two ways: first, by the aforementioned “fair

15 GORMAN, *supra* note 4, at 2 (“The Copyright Act that dominated the twentieth century was enacted in 1909. Inartfully drafted and lacking important definitions—and enacted before the invention or widespread commercial use of the phonograph, motion pictures, radio and television . . . was subject to frequent ad hoc amendment and to unguided judicial interpretation.”)

16 *See, e.g.*, Audio Home Recording Act, 17 U.S.C. §§ 1001-1010 (2006); Digital Millennium Copyright Act, 17 U.S.C. §§ 512 (2006). Technology, Education, and Copyright Harmonization Act of 2002, 17 U.S.C. § 110 (2002).

17 *See, e.g.*, *Eldred*, 537 U.S.; *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

18 Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2006).

19 *Id.*

20 17 U.S.C. § 501 (2011).

use” exceptions, which grant the public rights in various contexts, such as scholarship, parody, review, criticism, etc., especially when that which is utilized is incidental or minimal.²¹ More importantly, only the “expression” of ideas is protected, and not the ideas themselves.²² The first reason for this is that ideas are nearly impossible to protect. The second reason is that impeding the flow of ideas would be detrimental. The nature of ideas, discoveries, and art is such that it moves forward incrementally; each creator owes a debt to those creators who preceded him or her.²³ If ideas became property, it might threaten the creative progress, which would defeat entirely the purpose mentioned in the Copyright Clause.

II. THE POSSIBILITIES AND LEGAL “CHALLENGES” OF DIGITAL TECHNOLOGY

Now to examine the nature of digital media, in order to see if a more efficient balance could be struck between creator rights and public rights. The internet age has brought significant changes to innumerable facets of human life, and copyright considerations are no exception. These changes have brought with them great opportunities relating to creativity, art, and scholarship. However, because of current copyright law, many of these opportunities appear to be challenges, since a large portion of their applications are against the law as it stands today. If the law were revised to better fit the nature of digital media, society could legally benefit from the vast opportunities afforded. Specifically, the Copyright Act should be revised by eliminating the exclusive reproduction and distribution rights granted to copyright holders in the case of digital media.

The opportunities the internet provides to the fields of the arts and sciences are numerous. First, computers bring the process of

21 H.R. REP. No. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5564.

22 *Baker v. Selden*, 101 U.S. 99 (1879); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

23 *See generally* KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY*. (Oxford Univ. Press 2012).

recording and editing media such as music and film into the home. This facilitates authorship by making the creative process less expensive and more convenient, which lowers the barriers for amateurs and professionals alike to engage in creative acts. For example, there are on average 72 hours of video uploaded on Youtube every minute, and much of it is amateur and recorded on relatively inexpensive devices such as webcams.²⁴ This easy accessibility enriches the creative output in society.

Another great advantage that digital files have over material works is that they can be reproduced and distributed at virtually no cost. This unlimited reproducibility has a remarkable effect: namely, scarcity virtually ceases to be one of the economic factors governing these goods. Furthermore, as these reproduced files can be distributed across the world almost instantly from servers to clients via the internet, many other costs associated with sharing ideas and media—such as packaging, shipping, and storing—are reduced or eliminated.

Unfortunately, current copyright law restricts public engagement in these activities.²⁵ When the Copyright Act of 1976 grants copyright holders the right to “to reproduce the copyrighted work . . . [and] distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending,”²⁶ it either outlaws many of the most useful functions of digital technology entirely, or, if it does allow them, it adds unnecessary costs, as users must seek and/or pay for permission to do reproduce or distribute a work, requiring time and money.²⁷

Herein lies one of the “challenges” that digital technology has presented to the law: more opportunities for infringement, also known as “piracy.” The statistics on piracy are stunning.²⁸ Not only

24 Statistics, YOUTUBE, http://www.youtube.com/t/press_statistics.

25 GORMAN, *supra* note 4 at 99-119.

26 17 U.S.C. § 106(a) (2011).

27 *Id.* § 204.

28 See generally Hendrik Schulze & Klaus Mochalski, *Internet Study 2008/2009*, IPOQUE (2009), <http://www.ipoque.com/sites/default/files/mediafiles/documents/internet-study-2008-2009.pdf>.

is it easier than ever before to reproduce and distribute a work, it is also extremely difficult to police such actions on a significant scale.²⁹ Deterrence through increasing the likelihood of retribution is impractical on such a large scale (and raises concerns about privacy rights),³⁰ which has instead led courts to rely on severe, message-sending punishments that are arguably out of proportion with the nature of the crime.³¹

Piracy may seem malicious, but it also appears to be here to stay. Psychologically, piracy is simply more permissible than stealing in the minds of many.³² In fact, those who declare piracy as equivalent to stealing are at odds with the Supreme Court: in *Dowling v United States* in 1985, the Court stated that piracy “does not easily equate with theft, conversion, or fraud.”³³ The Court affirms an attitude that pervades digital culture by stating that piracy, while perhaps ethically questionable, does not share the same moral stigma as theft. In fact, it demonstrates a sort of moral and psychological loophole in public thinking—however hard the entertainment industry tries to equate the two practices, more people are willing to download a CD

29 Dave Lee, *A Glimpse at Piracy in the UK and Beyond*, BBC NEWS, (Sep. 16, 2012, 7:50 PM), <http://www.bbc.co.uk/news/technology-19599527>.

30 *ACTA Up*, THE ECONOMIST, Feb. 11, 2012, available at <http://www.economist.com/node/21547235>

31 See *Capitol v. Thomas*, 692 F.3d 899; (8th Cir. filed Sept. 11 2012). The defendant Jammie Thomas Rasset was ordered to pay sums ranging from \$54,000 dollars to \$1.92 million after appeals for the infringement of 24 songs.

32 Kanika Tandon Bhal & Nivedita D. Leekha, *Exploring Cognitive Moral Logics Using Grounded Theory: The Case of Software Piracy*, 81 J. OF BUS. ETHICS 635, 635-646; (2008) available at <http://www.jstor.org/stable/25482242>.

33 *Dowling v. United States*, 473 U.S. 207, 218 (1985).

than actually steal it.³⁴ For whatever reason, enough people choose to pirate virtual media that any attempt at rigorous enforcement would be impractical.

As neither internal morals nor external enforcement are sufficient to prevent it, a great deal of music ends up in consumer hands without passing through a channel that will reimburse the copyright holder. Thus, in practice, the system established in the Copyright Act fails to ensure the result that the Constitution requires. In effect, the strict provisions of the Act become something that amounts to legal deadweight, which, while failing to secure its intended benefits for artistic creators, still manages to promote costly litigation, preserve an obsolete economic system, and condemn millions of otherwise law-abiding Americans.

As long as current legal attitudes towards copyright prevail, technology and the law will remain at odds in this regard. This tension was created by an attempt to apply old law to new media, while simply ignoring the fact that these are not analogous in important ways. The provisions of the Copyright Act of 1976 that deal with reproduction and distribution are products of the time in which the Act was drafted; this is manifested in the fact that their intent is to protect objects. Current copyright law regarding distribution and reproduction makes sense in the case of physical materials, because materials, shipping, and transportation are costly. Copyright law gives publishers an incentive to assume these costs by protecting their rights to profit from that physical work. However, in the case of digital media, just about anybody can become a “publisher,” because the costs are minimal, requiring only a computer and an internet connection.

The irony is that all the law must do to solve its digital “problem” is in fact to embrace it. This could be accomplished by legalizing

34 See Julian Sanchez, *How Copyright Industries Con Congress*, Cato Institute (Jan. 3, 2012, 2:07 PM) <http://www.cato.org/blog/how-copyright-industries-con-congress>; Kal Raustiala & Chris Sprigman, *How Much Do Music and Movie Piracy Really Hurt the U.S. Economy?* FREAKONOMICS (Jan 12, 2012, 3:09 PM), <http://www.freakonomics.com/2012/01/12/how-much-do-music-and-movie-piracy-really-hurt-the-u-s-economy/>; ACTA Up, *supra* note 29.

private, personal reproduction and distribution (hereinafter referred to as “sharing”). As digital media effectively eliminates the problem of scarcity, the public is being presented with incredible opportunities. Theoretically, global culture and its accompanying art and entertainment could be as broadly accessible as the internet itself! The social implications are staggering—American culture need not be available only in proportion to one’s means; once the fixed cost of internet access is met, the marginal gains could be enormous. Furthermore, copying and sharing promote the advancement of the arts, which advancement has both a component of creation *and* scale of use and access.³⁵ Increasing the amount of legal sharing that takes place would foster scholarship and creativity by broadening the scope of the conversation, as it were. Both self-expression and scholarship heavily involve an engagement with the work of others. If more artists and creative minds were connected to each other, and more people had more access to the discourse, creativity would likely increase.³⁶

III. ENSURING CREATIVITY: ECONOMIC CONSIDERATIONS

While the benefits of relaxing copyright law are apparent, they are only half of the picture. Copyright law is a balance between the interests of two specific parties, and we have yet to examine how such a move would affect the people who are responsible for the benefits of the “Science and Useful Arts”: the creators themselves. It is important that revisions to copyright law be made without regard to the vested interests of particular business and consumer groups and instead be assessed by its consequences for efficiency in markets for creative works.³⁷ That being said, no amount of public right expan-

35 See Litman, *supra* note 11, at 29, 30. To illustrate with the inverse, if someone cannot access (directly or indirectly) a work, does it matter to them whether or not that work exists in the first place?

36 Kirby Ferguson, EVERYTHING IS A REMIX. (Dec. 7, 2012), <http://www.everythingisaremix.info>.

37 See NATHAN MUSICK, COPYRIGHT ISSUES IN DIGITAL MEDIA (Juyne Linger et al. eds., 2004), available at <http://permanent.access.gpo.gov/lps66530/08-09-Copyright.pdf>.

sion would be worth the extinction of authors and the works that they would have created. Before applying these proposed changes, then, one must investigate their potential impact on authors. While it is impossible to know exactly, broad trends give a good indication of what this impact would be, and the results are somewhat surprising. Granted, it is difficult to determine whether or not there is an “optimal” (i.e., economically efficient) amount of creative works, but it appears that even without the right to restrict sharing, incentives would remain sufficiently high to ensure great quantity, quality, and variety in creative output. This is because there are many factors besides sharing rights that provide incentive to create.

As long as art is costly to produce, basic economic theory asserts that there must be compensation to give incentive to create. Fortunately, even without granting creators the rights to govern sharing, the law can continue to provide incentive to create by protecting other exclusive rights for copyright holders. If the law were revised to give people freedom to exchange and share media privately, it could still protect creators’ claims to authorship as well as their ability to control the commercial uses of their works. This is a comparatively easy task which can yield huge gains for authors.³⁸

The first commercial use that can mean great deals of money for artists is associated with advertisement. Youtube,³⁹ a media sensation, is a perfect example of how this might function. If an artist releases their song or video on Youtube and chooses to monetize it through advertising, the result can be lucrative. An article published in *Rolling Stone* magazine reports that top artists may receive approximately \$1 for every 1000 views through advertisements.⁴⁰ Recently, an amateur “artist” made a video that included a song by

38 Jim Luke, *Corporate Entitlements: Music Edition*, ECONPROPH BLOG (May 30, 2011), <http://econproph.com/2011/05/30/corporate-entitlements-music-edition/>.

39 Lucas Hilderbrand, *Youtube: Where Cultural Memory and Copyright Converge*, 61 *FILM QUARTERLY* 48 (2007), available at <http://www.jstor.org/stable/10.1525/fq.2007.61.1.48>.

40 Steve Knopper, *The New Economics of the Music Industry*, *ROLLING STONE MAG.* Oct. 25, 2011, at 3, available at <http://www.rollingstone.com/music/news/the-new-economics-of-the-music-industry-20111025>.

Chris Brown called “Forever.” When this article was published, this amateur video had 70 million views. Instead of taking down the video, Sony (the copyright holder for Brown’s song) took a cut of the earnings, and Sony earned about \$70,000 serendipitously, if *Rolling Stone* estimates are correct.⁴¹ Thus, the incentive to create something popular could still be great even without the profit from selling media like property because popular works are valuable to advertisers who want to reach as many people as possible.

A different avenue of potential income is through commercial licensing.⁴² For example, when a song is popular, companies want to put it in commercials. A popular movie results in the sale of products associated with its characters, setting, or story. As with advertising, success gives incentive to piggyback, and the proposed relaxation of regulation does not change the artist’s ability to control and profit from such ventures.

Another possible means of artistic compensation is subscription: if an artist only releases his or her media on a subscription-based site, all those who access those works must pay some kind of entrance fee. Sites like Netflix offer access to television shows through subscription.⁴³ A variation of the subscription model is known as “freemium,” which allows people to freely use basic versions of their services with the option to pay a subscription fee for greater access. This model is employed by media distribution companies like Spotify as well as companies that create software.⁴⁴

These alternative models of revenue generation are not meant to be mutually exclusive; rather, they function in tandem to provide

41 *Id.*

42 *Online Software Piracy: Head in the Clouds*, THE ECONOMIST BLOG (July 25, 2012, 3:32 PM), <http://www.economist.com/blogs/graphicdetail/2012/07/online-software-piracy>.

43 Greg Bensinger, *Netflix Shares Surge 35% on Profit*, WALL ST. J., Jan. 24, 2013, at B1, available at <http://online.wsj.com/article/SB10001424127887324039504578260182003808560.html>.

44 See Katherine Heires, *Why It Pays to Give Away the Store*, BUS. 2.0, Oct. 1, 2006, available at http://money.cnn.com/magazines/business2/business2_archive/2006/10/01/8387115/index.htm.

incentives for an artist or publisher. Indeed, all of these approaches have promising elements in common. They are internet-intuitive, capitalizing on the vast network's ability to connect people and ideas on a vast scale. The openness of the model based on advertising would give less incentive to infringe, which would result in a compensation ratio that is closer to 1:1. One of the major drawbacks of the "property" system of copyright protection in the context of digital media is that it encourages freeloading, which may result in a low compensation ratio for the artist and produce an inefficient and less-than-ideal outcome.

To adopt these systems as the primary means of compensation for artists may have implications that initially feel uncomfortable: will artists cease to make music available for regular sale in favor of music made for licensing, subscription, and advertisement-driven sites? Will the public be able to "own" media any longer, or will they be tied to a view-by-view system? The answer to these questions may be yes; however, not only is this outcome more fair than expecting creators to allow the public to freeload, it is also a more beneficial system in the long run. Discounting an idea solely because it is a paradigm shift is short-sighted and ultimately detrimental.

On the other hand, allowing users to share digital media may not necessarily prevent an artist from making his or her work available to own and share. Publicity can create value, after all. When asked about the effect that piracy had on his income, one artist stated the following:

I sell a lot of tickets. I've sold 1.2 million albums, and the stat [sic] is that there's 8 million downloads of that as well illegally . . . Nine million people have my record, in England, which is quite a nice feeling . . . I'm still selling albums, but I'm selling tickets at the same time. My gig tickets are like £18, and my albums £8, so...it's all relative.⁴⁵

In the case of music, a "viral" song could function less as an item to be sold and more as a contagious form of advertisement that could lead to profits.

45 Lee, *supra* note 28.

Certainly, there are alternatives to pretending that digital media can function only as tangible property to be bought and sold, and these alternatives can provide incentive to create a work that will become popular and in high demand. This incentive is precisely what the Constitution requires and prescribes.

Finally, the “progress of the useful arts and sciences” may not rely quite as much upon rights-based incentives as one may think. There has been much commentary on the phenomenon of Wikipedia, an open-source encyclopedia that runs entirely on the creative and scholarly works of volunteers.⁴⁶ These volunteers receive neither compensation nor recognition, yet the site thrives with 24 million free articles.⁴⁷ The amount of creative contribution is astounding and seems to belie economic principles. Another example of this economic paradox can be seen in the highly competitive fields of careers in the arts. For example, BLS.gov reports that “many musicians and singers find only part-time or intermittent work and have long periods of unemployment between jobs.”⁴⁸ Despite this, “there should be strong competition for jobs because of the large number of workers who are interested in becoming musicians and singers.”⁴⁹ While it is true that some musicians, authors, filmmakers, etc., make great deals of money, the chances of any one person being able to do so are very

46 *Wikipedia:About*, WIKIPEDIA <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Jan. 19, 2013) (As of Jan. 14, Wikipedia reports 586,936,117 edits on the website, 18,250,367 registered users who can actively edit pages. They are all doing this free of charge with no financial benefit to themselves. Questions of reliability aside, this reflects a staggering of creative work done for free).

47 *Wikipedia*, WIKIPEDIA, <http://en.wikipedia.org/w/index.php?title=Wikipedia> (last visited Jan. 19, 2013).

48 BUREAU OF LAB. STAT., <http://www.bls.gov/ooh/entertainment-and-sports/musicians-and-singers.htm>

49 *See id.*

small. That lottery's chance of success would also be present in the alternative economic models described here.⁵⁰

Any explanation as to why people choose to contribute to the arts and sciences with little to no compensation would be merely speculative and is beyond the scope of this paper. However, this behavior is a reality, and it suggests that whatever decrease in incentive that might result from legal copyright change would not be overly detrimental to creative output.

IV. CONCLUSION: THE BIG PICTURE

The Constitution provides that the law protect certain rights for authors so that art, science, entertainment, and scholarship will progress. The current codified interpretation in the Copyright Act of 1976 is problematic and outdated in the sense that it erroneously treats digital works the same as it treats works that are inherently more tangible. This policy is easy to abuse and difficult to enforce. The internet is at once largely responsible for these abuses and the provider of an incredible opportunity because it can virtually free us from scarcity in many cases. This freedom could lead to an incredible expansion of intellectual and creative progress: greater accessibility means that as a work's benefit to society increases, the intellectual/creative conversation becomes more widespread and democratic, and media becomes a socially equalizing force. This could be accomplished by expanding the existing definition "fair use" to allow for private reproduction and distribution. The biggest potential drawback of such a move is the decrease of incentive for artists and authors to produce creative works; however, the internet itself allows many other ways to monetize creative endeavor in the absence of vending—not to mention the fact that there seem to be

50 Even if perhaps the odds become slightly slimmer or the "jackpot" reduces somewhat without the right to sell digital files, it seems unlikely that this will greatly affect people's perception of the potential upside and likely downside of pursuing a creative path. In other words, the difference between "1 in a million" and "1 in 1.37 million" would probably have a negligible effect on people's perception of the opportunities of the industry, both situations being likely to be perceived as "very small."

other compelling factors besides monetary compensation that drive people to create. Since this proposed change would most likely leave plenty of incentive to innovate, it is Constitutional as well as economically and socially beneficial.

The actions of the general population support the idea that media “sharing” is not as insidious as it is often portrayed. Otherwise law-abiding people have been known to engage in copyright infringement despite commercials, piracy warnings, and lectures attempting to persuade them that sharing is as wrong as stealing and that it is destroying the art and entertainment industry. While this might make the offending parties feel a bit guilty or vaguely nervous about being caught, it appears that many people do not seem to find such arguments all that convincing, perhaps because they subconsciously realize that their actions may not be as detrimental as anti-sharers might think. Sharers continue to participate in the revolutionary new sharing culture that has emerged with the internet. One might expect that an age of unprecedented piracy would coincide with a sharp decline in creative endeavors, but this does not appear to be the case. This generation seems to match or even surpass any other in terms of the quality, quantity, and variety of creative endeavor.⁵¹ The law would do well to recognize this and should update policy accordingly.

51 See generally CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATION* (Penguin Books, 2009).