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United States Response to Questionnaire Concerning *Copyright: To Be or Not to Be*

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**United States Response to Questionnaire Concerning
ALAI 2017 Congress
Copenhagen, Denmark
Copyright: To be or not to be**

By June M. Besek, Jane C. Ginsburg and Nathalie Russell¹

Authors' Note: The U.S. Copyright Act is contained in Title 17 of the United States Code and is available on the Copyright Office website, <<http://www.copyright.gov>>. Statutory references in this response are to Title 17, unless otherwise indicated.

The traditional justifications for copyright and related rights:

1. In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?

The U.S. Constitution empowers Congress “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.”² This clause is commonly referred to as the Copyright and Patents clause and sets out a primary justification for copyright: “to promote the progress of science.” Science, in the eighteenth century when the U.S. Constitution was adopted, meant knowledge or learning. A legislative report on the Copyright Act of 1909 explains:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.³

The granting of a temporary monopoly, copyright being considered an exclusive property right, is justified as a “means” to the desired “end” of “foster[ing] the growth of learning and culture for the public welfare.”⁴ This essential bargain has also been associated with a “secondary purpose: To give authors the reward due them for contribution to society. These two purposes are closely related. Many authors could not devote themselves to creative work without the prospect of remuneration. By giving authors a means of securing the economic reward afforded by the market, copyright stimulates their creation and dissemination of intellectual works. Similarly, copyright protection enables publishers and other distributors to invest their

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² U.S. Const., art I, § 8, cl. 8.

³ H.R. REP. NO. 2222, 60th Cong., 2d Sess., at 7 (1909).

⁴ STAFF OF S. COMM. NO. 3 (PATENTS, TRADEMARKS AND COPYRIGHTS) OF HOUSE COMMITTEE ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION: REP. OF THE REGISTER OF COPYRIGHTS ON THE GEN. REV. OF THE U.S. COPYRIGHT LAW 3-6 (1961).

resources in bringing those works to the public”⁵

While the characterization of copyright as a utilitarian *quid pro quo* dominates U.S. copyright discourse, a natural rights conception has also, albeit sometimes dimly, informed U.S. copyright law since its inception. After the close of the Revolution, all of the Colonies except Delaware passed laws to afford a measure of protection to authors, pursuant to a recommendation of the Continental Congress,⁶ and the entreaties of Noah Webster,⁷ who tirelessly (and self-interestedly) urged that protecting authors not only responded to the claims of natural justice, but would spawn the creation of the kinds of American-oriented school books, geographies and dictionaries essential to the development of the citizenry of the new republic.⁸ Webster thus coupled the cultural policy of the new nation with the recognition of authors’ inherent rights in their works. Similarly, many states mingled natural rights rhetoric with the more utilitarian inspiration of the English Statute of Anne. For example, the preamble to the Massachusetts Act of March 17, 1783 proclaims:

Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man’s own than that which is procured by the labor of his mind.⁹

Connecticut, New Hampshire, Rhode Island, North Carolina, Georgia, and New York also enacted copyright laws combining natural rights and public-benefit rationales.¹⁰

The constitutional copyright clause’s authorization to Congress to promote the progress of learning “by securing for limited times to authors . . . the exclusive right to their . . . writings” also reveals undercurrents of natural property claims, for “securing” suggests that some kind of exclusive right already inhered in works of authorship. Hence Madison’s reference in Federalist 43 to copyright in Britain as “a right of common law.”¹¹ The clause’s direction that the exclusive right be “for limited times,” in the plural, may also advert to the Statute of Anne’s conditional second term of copyright, and thereby implicitly endorse the author’s reversion right established by the English example.

⁵ *Id.*

⁶ 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 326 (1783).

⁷ Noah Webster, best known today for his publication of the first American dictionary (which became the Merriam-Webster Dictionary), has been called “the father of copyright legislation in America.” DAVID MICKELTHWAIT, NOAH WEBSTER AND THE AMERICAN DICTIONARY (2000) (citing HARRY R. WARFEL, NOAH WEBSTER: SCHOOLMASTER TO AMERICA 58 (1936)). Mark David Hall writes: “As a result of a campaign spearheaded by Connecticut’s Noah Webster, Connecticut passed the first copyright law in the nation. . . . The Connecticut copyright act had tremendous influence on subsequent state and national acts.” MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 193 (2013).

⁸ Noah Webster, *Origin of the Copy-Right Laws in the United States*, in A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS (N.Y. 1843 & B. Franklin ed. photo. reprint 1968); Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 131, 138-39 (Brad Sherman & Alain Strowel eds., 1994).

⁹ COPYRIGHT ENACTMENTS OF THE UNITED STATES 14 (Thorvald Solberg ed., 1906).

¹⁰ *See id.* at 11, 14, 18, 19, 25, 27 and 29; Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC’Y 11 (1975).

¹¹ Federalist No. 43 is one of a series of famous essays (known collectively as “The Federalist Papers”) written by James Madison, Alexander Hamilton, and John Jay in support of ratification of the U.S. Constitution. Each essay was published separately under the pseudonym “Publius” in New York City newspapers between 1787 and 1788. In Federalist 43, Madison also wrote that “The public good fully coincides in both cases [copyright and patent] with the claims of individuals.” THE FEDERALIST NO. 43 (James Madison).

U.S. case law generally evokes the utilitarian justification structure (public benefit first; author's reward second). In *Mazer v. Stein*, 347 U.S. 201 (1954), the Court stated:

“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”¹²...However, it is “intended definitely to grant valuable enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.”¹³

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in “Science and useful Arts.” Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.¹⁴

More recent case law agrees: “[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”¹⁵

2. Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?

The United States does not have a separate related or neighboring rights regime. Sound recordings were first protected as federal copyrightable subject matter in 1972. Sound recordings are considered “writings of authors” and copyright in sound recordings has been justified on largely the same constitutional grounding as copyright in literary and artistic works.

Live performances are not protected as works under U.S. federal copyright because of their unfixed nature. Performers do, however, benefit from the provisions of the Anti-Bootlegging Act of 1994, codified at 17 U.S.C. §1101 and 18 U.S.C. §2319A, which offer performers protection against unauthorized fixation, distribution, and transmission of their live musical performances. The practical justification for this protection is U.S. compliance with Article 14 of the TRIPS agreement. More fundamentally, the performers' right of fixation has been considered a limitation on the “free enjoyment of music” and other types of works.¹⁶ Its justification is therefore, like that for works protected under copyright, rooted in the public benefit from promoting creativity.¹⁷

3. Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?

The *quid pro quo* of U.S. federal copyright set out above can be linked to a series of limitations on the “exclusive” right that Congress is empowered by the Constitution to grant to authors.

Formalities: “Beginning with the 1790 Act and until the 1976 Act, U.S. federal copyright protection

¹² *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

¹³ *Washington Pub. Co. v. Pearson*, 306 U.S. 30, 36 (1939).

¹⁴ 347 U.S. 201, 219 (1954).

¹⁵ *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 429 (1984).

¹⁶ Borge Varmer, *Limitations on Performing Rights*, in 2 STUDIES ON COPYRIGHT 82 (Arthur Fisher Memorial ed. 1963).

¹⁷ *Id.*

did not attach until the author published her work and complied with a variety of obligations of notice, deposit, and registration... The policy underlying the notice-giving emphasis of formalities may be two-fold, not only to protect the public against unwitting violations, but also to temper the limited monopoly the statute instituted. Authors might have exclusive rights to print, reprint, and vend, but they first would be put to the burden of making their claims clear.”¹⁸

Fair Use: 17 U.S.C. §107 sets out the statutory exception of fair use. “[T]he traditional concept of fair use excused reasonable unauthorized appropriations from a first work, when the use to which the second author put the appropriated material in some way advanced the public benefit, without substantially impairing the present or potential economic value of the first work.”¹⁹

Rights of Attribution and Integrity: U.S. adherence to the Berne Convention required adoption of the *6bis* moral rights. U.S. implementation has arguably recognized these rights via a more utilitarian “patchwork”²⁰ of rights, which could be interpreted as resulting from the more utilitarian (and less natural-rights-based) legislative justifications for American copyright.²¹

Despite the number of exceptions embedded in the law, certain provisions are also reflective of the principle that copyright enables authors to make a living. Notably, termination provisions and (for works first published under the 1909 Act) renewal terms served to protect authors from the unbalanced power dynamic inherent in, for example, publishing agreements, as well as from the unpredictability of a work’s future success.

4. Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?

Many scholars share the fundamental premise that the copyright system exists because of the advantages to society. They differ, however, with respect to whether the societal benefits constitute the *primary* justification for copyright and whether the right of copyright is a natural right and/or even a property right.

Influenced by English law, many early scholars such as Eaton S. Drone²² and George Ticknor Curtis

¹⁸ ROBERT A. GORMAN, JANE C. GINSBURG & R. ANTHONY REESE, *COPYRIGHT CASES AND MATERIALS* 490 (9th ed. 2017).

¹⁹ *Id.* at 805.

²⁰ “According to the legislative history, those existing causes of action include:

- 17 U.S.C. § 106 right to prepare derivative works
- 17 U.S.C. § 115 prohibition on distortion of musical compositions
- 17 U.S.C. § 203 restriction on termination of licenses and transfers
- Section 43(a) of the Lanham Act
- State right of publicity laws
- State unfair competition laws
- State contract laws
- State fraud and misrepresentation laws
- State defamation laws
- State moral rights legislation.”

Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 3 UTAH L. REV. 659, 666 (2007) (citing generally H.R. REP. NO. 100-609, 100th Cong., 2d. Sess., at 34 (1988)).

²¹ Hughes writes that “[r]eluctance to modify the copyright law may have stemmed from simple conservatism against fiddling with established law or fresh memories on Capitol Hill from the painfully protracted effort to revise U.S. copyright law in the 1960s and 1970s.” *Id.* at 666. See also Jane C. Ginsburg, *Moral Rights in a Common Law System*, 1 ENT. L. REV. 121, 122 (1990) (making utilitarian arguments for moral rights).

²² Drone wrote that “[o]wnership...is created by production, and the producer becomes the owner. This principle is general, and covers all productions, – the whole field of labor. It cannot be applied to the produce of one kind of labor,

considered artists' rights natural rights. Defining natural law as "not only the naked rights of man in the natural state, but also the *status* of mankind after those rights have been to some extent modified by the conditions of civilized society,"²³ George Ticknor Curtis wrote:

The author of every original literary composition creates both ideas and the particular combination of characters which represents those ideas upon paper. He is therefore an inventor, in two senses; and he has the exclusive possession, before publication, of his invention.²⁴

The author, then, has in his possession a valuable invention, which he may withhold or impart to others at his pleasure. His dominion over his written composition is perfect, since it is founded both in occupancy or possession, and in invention or creation. No title can be more complete than this.²⁵

From this full and complete title flows the right to annex conditions to the transfer of such a written composition, when the author chooses to impart the possession of it to others. It cannot be doubted that this right is inherent in every possession vested in an individual by the rules of natural or positive law.²⁶

Years later, Zechariah Chafee justified artists' rights both on the grounds that they constitute a natural right²⁷ and on utilitarian grounds;²⁸ however, Chafee considered the primary purpose of copyright what Congress termed its "secondary purpose": to benefit artists. Chafee writes that "[t]he primary purpose of copyright is, of course, to benefit the author. . . Authors, musicians, painters are among the greatest benefactors of the race. So we incline to protect them."²⁹

Chafee explains that the temporary monopoly bestowed on authors by the Constitutional Copyright clause is a flawed but necessary means by which to benefit authors:

We do not expect that much of the literature and art which we desire can be produced by men who possess independent means or who derive their living from other occupations and make literature a by-product of their leisure hours. Support by the government or by patrons, on which authors used to depend, is today no good substitute for royalties. So we resort to a monopoly, in spite of [its] plain disadvantage.³⁰

and withheld from that of another. It matters not whether the labor be of the body or of the mind. The yield of both comes under the same fundamental principle of property, which recognizes no distinction between the poet and the peasant in the ownership of their productions." EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 5 (1879).

²³ GEORGE CURTIS TICKNOR, *THE MAKING OF MODERN LAW: LEGAL TREATISES* 1 (1847).

²⁴ *Id.* at 11-12.

²⁵ *Id.* at 12.

²⁶ *Id.* at 12-13.

²⁷ Chafee cites Harvard geologist Nathaniel S. Shaler, who stated in 1878 that "...intellectual property is, after all, the only absolute possession in the world. . . The man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property. . ." Zechariah Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 506 (1945) (citing Solberg, *Copyright Reform*, 14 NOTRE DAME LAWYER 343, 358 (1939) (citing Shaler))).

²⁸ Chafee cites Lord Thomas Macaulay, who stated in 1841 that "[i]t is desirable that we should have a supply of good books: we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of remunerating them is by means of copyright." *Id.* at 507 (citing Macaulay, *Copyright (1841 speech in House of Commons)*, in 8 LORD THOMAS MACAULAY, *THE WORKS OF LORD MACAULAY* (Lady Hannah Trevelyan ed. 1879) 195, 197)).

²⁹ *Id.* at 506-7.

³⁰ *Id.* at 507.

Indeed, in the balancing of interests with respect to authors' rights, despite recognizing the burden copyright imposes on the public,³¹ Chafee frames the copyright monopoly entirely in terms of benefit to authors:

The burden which the monopoly should impose on readers and competing publishers should be roughly limited to what will produce the following benefits: (a) for the author, to supply a direct or indirect pecuniary return as an incentive to creation and to confer upon him control over the marketing of his creation; (b) for the surviving family, to give a pecuniary return which will save them from destitution and impel the author to create, without allowing the family to abuse a prolonged monopoly; (c) for the publisher, to give a continued pecuniary return which will indirectly benefit the author and yield to the publisher an equitable return on his investment, but which will not prevent the public from getting easy access to the creation after the author's death.³²

In 1966, Benjamin Kaplan represented a turn towards the more utilitarian justification for authors' rights associated with modern American copyright. Kaplan writes:

Copyright law wants to give any necessary support and encouragement to the creation and dissemination of fresh signals or messages to stir human intelligence and sensibilities: it recognizes the importance of these excitations for the development of individuals and society. Especially is copyright directed to those kinds of signals which are in their nature "fragile" – so easy of replication that incentive to produce would be quashed by the prospect of rampant reproduction by freeloaders. To these signals copyright affords what I have called "headstart," that is, a group of rights amounting to a qualified monopoly running for a limited time.³³

Still, Kaplan did not completely abandon the notion of Copyright as a property right:

To say that copyright is "property," although a fundamentally unhistorical statement, would not be baldly misdescriptive if one were prepared to acknowledge that there is property *and* property, with few if any legal consequences extending uniformly to all species and that in practice the lively questions are likely to be whether certain consequences ought to attach to a given piece of so-called property in given circumstances. In the same way we might make do with "personality" or some other general characterization of copyright.³⁴

Present-day scholar David Nimmer supports the utilitarian Constitution-based public benefit justification for authors' rights:

[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities. Implicit in this rationale is the assumption that in the absence of such public benefit, the grant of a copyright monopoly to individuals would be unjustified. This appears to be consonant with the pervading public policy against according private economic monopolies in the absence of overriding

³¹ Although Chafee's recognition of social burden is more in terms of the risk to authors of not being able to disseminate their works due to too high a social burden resulting in only a limited number of people being able to pay. He therefore writes that "we must be sure that a particular provision of the Copyright Act really helps the author – that it does not impose a burden on the public substantially greater than the benefit it gives to the author." *Id.*

³² *Id.* at 510-11.

³³ BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 74-76 (1967).

³⁴ *Id.* at 74.

countervailing considerations...³⁵

With respect to whether “copyright should be regarded as properly based upon the ‘natural right’ concept fundamental (at least in origin) to the theory of private property,”³⁶ however, Nimmer aligns more closely with the earlier scholars and natural law proponents. Nimmer writes:

The fruits of an author’s labor seem to be no less deserving of the privileges and status of “property” than are the more tangible creative efforts of other laborers...[T]here is nothing to indicate that the Framers in recognizing copyright intended any higher standard of creation in terms of serving the public interest than that required for other forms of personal property. We may assume that the men who wrote the Constitution regarded the system of private property *per se* as in the public interest. In according a property status to copyright, they merely extended a recognition of this public interest into a new sector.³⁷

Therefore, the phrase “To promote the progress of science and useful arts ...” must be read as largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise.³⁸

Nimmer’s contemporary William Patry, however, explicitly rejects all natural rights-based justifications for copyright:

Copyright in the United States is not a property right, much less a natural right. Instead, it is a statutory tort, created by positive law for utilitarian purposes: to promote the progress of science. Once copyright is correctly viewed as positive law, proper discourse can take place—either at the policy level (before Congress) or at the statutory interpretation level (before the courts).³⁹

Another famous modern American copyright treatise by Paul Goldstein also rejects all natural rights-based justifications for copyright. Goldstein adopts a purely utilitarian-based justification, citing both Congressional intent and the U.S. Supreme Court. Specifically, Goldstein cites the Supreme Court’s decision in *Wheaton v. Peters*,⁴⁰ which according to Goldstein, “definitively rejected natural rights as copyright’s founding premise, observing that, when it enacted the first copyright act, Congress, ‘instead of sanctioning an existing right,...created it.’”⁴¹ Goldstein continues:

Seventy-five years after *Wheaton v. Peters*, the House Report on the 1909 Copyright Act echoed the Supreme Court’s rejection of natural rights as the foundation of American copyright law. The Report explicitly rested copyright on a utilitarian foundation of social benefit: “The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings...but upon the ground that the welfare of the public will be served and progress of science and useful arts promoted by securing to authors for limited periods the exclusive rights to their writings.”⁴²

³⁵ 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (Matthew Bender, rev. ed. 2016).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ 3 WILLIAM F. PATRY, PATRY ON COPYRIGHTS §1:1 (2017).

⁴⁰ *Wheaton v. Peters*, 33 U.S. 591 (1834).

⁴¹ 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT, §1.13.2.2 (2016) (citing *Wheaton v. Peters* 33 U.S. at 660-661).

⁴² *Id.* at §1.13.2.3 (citing H.R. REP NO. 2222: “In enacting a copyright law Congress must consider...two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.” *Id.*).

Still, Goldstein recognizes that practical application of the theoretical utilitarian-based justification for American copyright may be less apparent:

In adopting utilitarianism as American copyright law's founding premise, Congress assigned itself a difficult task. Natural rights theory extends copyright protection automatically – as a matter of right – to every new form of literary and artistic work and against every new use that is made of these works. Utilitarianism, by contrast, requires Congress to identify and balance the costs and benefits of extending copyright to a new type of work or against a new kind of use. Utilitarianism has worked better in theory than in practice. While congressional committees will episodically invoke the utilitarian rhetoric of cost and benefit,⁴³ the legislative record in fact reveals a regular expansion of copyright with little empirical inquiry into a particular measure's costs and benefits.⁴⁴

Despite “the prevailing view...that U.S. IP law has always had a utilitarian orientation,”⁴⁵ not all modern American scholars reject natural rights or moral rights-based theories of copyright. Notably, Robert Merges uses research and empirical studies – the same scientific grounds upon which many support a utilitarianism justification – to support a more natural rights-based justification for all forms of Intellectual Property rights. Merges cites studies involving children and the notion of ownership, concluding:

What these studies show is that there are strong regularities in people's thinking about ownership, fairness, and the importance of creative labor. And because the studies are cross-cultural, involve children, or both, they support the idea that moral judgments about these issues may be less due to socialization in a particular culture and more due to a basic shared moral sense.⁴⁶

In an effort to “harmonize” utilitarian and moral rights justifications, Merges proposes “general” or “midlevel” principles to “mediate between foundational justifications and specific doctrines.”⁴⁷ For Merges, the divergence in justifications “is not a very big issue in the day to day debates in the field...because the debates take place on a different plane from that of foundational justification. Policy arguments employ standard themes that are distinct from the rigorous requirements needed to ground foundational justifications for the field.”⁴⁸ Merges' “midlevel principles” include “efficiency, nonremoval (or solicitude for the public domain) and dignity.” With respect to the principle of efficiency, Merges writes:

[W]e cannot justify IP rights based on current knowledge of their costs and benefits. The data are inadequate to the task. But, given the decision to have IP rights, important features of our current IP regime can be explained by recourse to the principle of efficiency. Using the best data and analytic techniques at our disposal, we as a society try to maximize the net benefits of IP rights. Put simply, the argument is that we do not have IP rights because we are sure they are efficient, but given that we have them—because they are justified by Lockean, Kantian, or other deontological normative precepts—we strive to make our IP system as efficient as possible. So efficiency explains and ties together important aspects of the IP system as practiced, even though we cannot be sure of the utilitarian case for IP. To state this simply, one might say that efficiency is a good *quality or feature* for an IP system, but not an acceptable *rationale* for it.⁴⁹

⁴³ *Id.* (citing generally Robert Kastenmeier & Michael Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417 (1985)).

⁴⁴ *Id.*

⁴⁵ Robert P. Merges, *Philosophical Foundations of IP Law: The Law and Economics Paradigm*, in 1 THE RESEARCH HANDBOOK ON THE ECONOMICS OF IP LAW 1, 3 (Peter S. Menell, Ben Depoorter & David Schwartz, eds., 2016).

⁴⁶ *Id.* at 23.

⁴⁷ *Id.* at 27.

⁴⁸ *Id.* at 26.

⁴⁹ *Id.* at 27.

Economic aspects of copyright and related rights:

5. Has there in your country been conducted research on the economic size of the copyright-based industries?

Copyright Industries in the U.S. Economy, The 2016 Report, prepared for the International Intellectual Property Alliance (“IIPA”)⁵⁰ by Stephen E. Siwek, “is the sixteenth in a series issued over the last 26 years by Economists Incorporated, updating and supplementing fifteen earlier reports prepared on behalf of the IIPA. This latest *Report* presents data on the value added contributions of the copyright sector to the U.S. economy for the years 2012-2015; the percentage contribution of the copyright sector to the overall U.S. economy; the relative growth of the copyright industries compared with the remainder of the economy; employment levels in the copyright sector; the average compensation for workers in the copyright sector in comparison to other sectors; and the contributions of selected copyright industries to exports and foreign sales. The underlying data used in th[e] *Report* is current through 2015.”⁵¹

6. Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?

The 2016 Copyright Industries in the U.S. Economy Report (see our response to Question 5 above) “reflect[s] the use of industry data classifications adopted under the North American Industry Classification System (“NAICS”) which has been widely implemented by U.S. statistical agencies. It also... follow[s] the [World Intellectual Property Organization (“WIPO”) *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*],⁵² international standards and recommendations propounded by the WIPO in 2003 regarding the development of economic and statistical standards to measure the impact of domestic copyright industries on domestic economies.”⁵³

7. Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection?

Most studies are not U.S.-specific, instead considering international impact, of which the U.S. is part. Still, U.S.-specific studies do exist. In 1998, Edward Rappaport published a Congressional Research Service Report for Congress entitled *Copyright Term Extension: Estimating the Economic Values*.⁵⁴ The Report was prepared in response to various bills proposing to extend the duration of copyrights by 20 years.⁵⁵ It measured “the income that would flow to owners of” random samples of works from the period

⁵⁰ The IIPA is a “private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers.” *About the IIPA*, International Intellectual Property Alliance, <http://www.iipawebsite.com/aboutiipa.html> (last visited Feb 20, 2017). The IIPA’s activities include the submission of an annual report, advocating before Congress, and supporting the U.S. Government in negotiating intellectual property rights provisions in free trade agreements and international agreements (including TRIPS).

⁵¹ Stephen E. Siwek, *Copyright Industries in the U.S. Economy, The 2016 Report*, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (2016), <http://www.iipawebsite.com/pdf/2016CpyrtRptFull.PDF>.

⁵² *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*, WIPO (2015), http://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf.

⁵³ Siwek, *supra* note 51.

⁵⁴ Edward Rappaport, *Copyright Term Extension: Estimating the Economic Value*, CONGRESSIONAL RESEARCH SERVICE (May 11, 1998), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/crs/98-144.pdf.

⁵⁵ Bills proposing a 20-year term extension included H.R. 2589, H.R. 604, H.R. 1621 and S. 606. H.R. 2589, known as the (Sony Bono) Copyright Term Extension Act, was ultimately passed in 1998.

1922-1941 (at the time, due to expire during 1998-2017) if the 20-year extension were adopted.⁵⁶ The Report found that:

In the initial years, almost all of the potential revenue is attributable to books. However, the book revenues subsequently grow only very slowly, rising from \$8 million in the first year to \$13 million for the books expiring in the 20th year. After five years the movie revenues grow rapidly and reach parity with books (in terms of the latest-year expirations) by 2012. Music revenues are smaller than the other media throughout the period but give indications of growing comparable to them with the works of the 1940s (expiring in the 2020s).⁵⁷

More recently, Google financed a quantitative report, researched and written by Booz & Company authors Matthew Le Merle, Raju Sarma, Tashfeen Ahmed, and Christopher Pencavel.⁵⁸ This study considered the effects of copyright regulations on angel⁵⁹ and venture capital investment in “digital content intermediaries (DCIs) that provide search, hosting, and distribution services for digital content.”⁶⁰ The study concluded that:

Increasing liability for content providers would have a greater negative impact on early-stage investment than would a weak economy and an increased competitive environment combined.

Holding DCIs liable for the content uploaded by users would have a significantly negative effect on investment in this space, reducing the pool of interested angel investors by 81 percent.

Regulations making users more easily prosecuted for copyright violations would have a negative effect on investment in this space, reducing the pool of interested angel investors by 48 percent.

A large majority of angels and venture capitalists support increased clarity in copyright law, especially if it would decrease the level of ambiguity surrounding the probability of facing a lawsuit in cases of copyright infringement, as well as the size of damages in the event of liability. Fully 80 percent report being uncomfortable investing in business models in which the regulatory framework is ambiguous.⁶¹

With respect to the benefits of collective management of copyright and related rights, a 2015 article by Richard Watt examines economic benefits beyond those resulting from the sharing of transaction costs. Watt explains:

Copyright collectives form contracts at two principle points along the supply chain. First, there are the contracts between the collective’s members themselves (the copyright holders) for distribution of the collective’s income. And second there are the licensing contracts that the collective signs with users of the repertory. Using standard economic theory, [Watt argues] that there are significant efficiency benefits from having copyrights managed as an aggregate repertory, rather than individually, based on risk-pooling and risk-sharing through the contracts between the members

⁵⁶ Rappaport, *supra* note 54, at ii.

⁵⁷ *Id.* at 16.

⁵⁸ Matthew le Merle *et al.*, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment : A Quantitative Study*, BOOZ & Co. (2011), <http://www.strategyand.pwc.com/media/uploads/Strategyand-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

⁵⁹ Angel investors are private, individual investors who often exchange a significant amount of personal capital for equity stake in a start-up or emerging company.

⁶⁰ *Id.* at 5.

⁶¹ *Id.* at 6.

themselves. Similarly, there are also aggregation benefits (at least in terms of the profit of the CMO) of licensing only the entire repertoire, rather than smaller sub-sets.⁶²

Another relevant study was commissioned and prepared for National Academies of the Sciences' Committee on the Impact of Copyright Policy on Innovation in the Digital Era.⁶³ Written by Christian Handke, the Report surveys "quantitative-empirical literature [regarding copyright] that is based on economic theory."⁶⁴ Handke concludes that "many empirical studies produced conflicting or counter-intuitive results... Overall, the picture that emerges is still ambiguous and patchy."⁶⁵

Although not examining the beneficiaries of copyright directly, Seung-Hyun Hong's 2011 study measures Napster's effect on the music industry (specifically, record sales).⁶⁶ Because Napster was subsequently held to infringe on copyrights, the study can be understood as evidence of copyright protection's benefits for American music industry actors. Hong examined "changes in household-level recorded music expenditure between the periods before and after the introduction of Napster...[and]...[ou]nd evidence suggesting that file sharing is likely to explain 20% of total sales decline in recorded music during the Napster period, and that this negative effect is concentrated in households with children aged 6-17."⁶⁷

Another study by Thomas Rogers and Andrew Szamosszegi addresses the beneficiaries of the fair use exception to the exclusive rights conferred by U.S. copyright.⁶⁸ The Report presents data from 2002 to 2007, concluding that "the industries benefiting from fair use – and other limitations and exceptions – make a large and growing contribution to the U.S. economy."⁶⁹ With respect to the year 2007, the Report shows that "[t]he fair use economy in 2007 accounted for \$4.7 trillion in revenues and \$2.2 trillion in value added, roughly one-sixth of total U.S. GDP. It employed more than 17 million people and supported a payroll of 1.2 trillion. Fair use companies generated \$281 billion in exports and rapid productivity growth."⁷⁰

Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights:

8. Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights?

There are several collective licensing societies in the United States. Generally, they are broken up by

⁶² Richard Watt, *The Efficiencies of Aggregation: An Economic Theory Perspective on Collective Management of Copyright*, in 12 REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES 26, 26 (Richard Watt Ed., 2015). The Review of Economic Research on Copyright Issues is published by the Society for Economic Research on Copyright Issues, an organization founded in 2001 "with the principal objective of providing a solid academic platform from which scientific debate concerning copyright, dealt with from an economic theory perspective, can be launched and defended." *About*, THE SOCIETY FOR ECONOMIC RESEARCH ON COPYRIGHT ISSUES, <http://www.serci.org/about.htm> (Last visited Feb. 26, 2017).

⁶³ Christian Handke, *Economic Effects of Copyright, The Empirical Evidence So Far*, Report for the National Academies of the Sciences (April 2011),

http://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_063399.pdf.

⁶⁴ *Id.* at 10.

⁶⁵ *Id.* at 41.

⁶⁶ Seung-Hyun Hong, *Measuring the Effect of Napster on Recorded Music Sales: Difference-in differences Estimates under Compositional Changes* (July 7, 2011), <http://faculty.las.illinois.edu/hyunhong/napster.pdf>.

⁶⁷ *Id.* at 35.

⁶⁸ Thomas Rogers and Andrew Szamosszegi: *Fair Use in the U.S. Economy: Economic Contributions of Industries Relying on Fair Use*, CAPITAL TRADE, INC. (2011), https://www.wired.com/images_blogs/threatlevel/2010/04/fairuseeconomy.pdf.

⁶⁹ *Id.* at 9.

⁷⁰ *Id.*

the genre(s) of work they represent.

For works of visual art, the two largest are the Artists Rights Society (ARS) and the Visual Arts and Galleries Association (VAGA).⁷¹ Each of these societies represents a list of visual artists.⁷² In general, they represent all the exclusive rights in the works of the artist including an exclusive right to negotiate all reproduction and licensing of the artists' works, although there are some artists for whom this is not true.⁷³ There is no firm rule; each artist or his or her estate negotiates individually with the organization regarding what rights they will grant to the licensing organization. Although these organizations represent the artists, each licensing opportunity that arises is brought to the artist in question and discussed with him or her (or his or her representatives). Robert Panza, Executive Director of VAGA, says this is because each artist wishes to control where his or her images are licensed and will not grant the licensing organizations the right to systematically license on his or her behalf without consent. It should be noted that neither of these organizations, together or separately, represent the entire market. There are many artists who do not participate in collective management of their works at all.

Copyright Clearance Center, Inc. (CCC) is a not-for-profit rights broker, representing copyright holders of all kinds of text-based works (including in- and out-of- print books, journals, newspapers, magazines, blogs and ebooks), in licensing the right to reproduce their works.⁷⁴ These licensees include for-profit and not-for-profit businesses, academic institutions, government agencies and individuals. CCC offers both digital-use and photocopy-use licenses in both pay-per-use form and repertory form (one payment for all covered uses for a year), and in both centralized (through CCC's office and website) and decentralized (at rightsholders' own websites) contexts. It then collects royalties from licensees and remits them to the applicable rightsholder. CCC's services are entirely voluntary, opt-in and non-exclusive for both rightsholders and users; that means that, unlike somewhat similar organizations in most other countries, CCC operates pursuant to no statutory licenses or levy systems. It is important to note that CCC is not currently as widely representative of rightsholders as are many RROs in other countries.

The Authors' Registry is an organization based in New York that collects and distributes to U.S. authors royalty payments collected abroad.⁷⁵ The Registry acts as a clearinghouse or payment agent for certain foreign organizations with whom it has agreements. It receives payments from those organizations and distributes them to U.S.-resident authors. Primarily it works with book authors, who cover the full spectrum, including trade, academic, and technical books, but will collect royalties for any author of the written word. It should be noted that it does not represent the rights of the authors to whom they distribute these payments; they are merely assigned the duty to collect and distribute revenues collected from foreign collective management societies. Rather, the organization has an agreement with each payee which authorizes the Registry to collect and disburse these payments to them. All usage tracking and calculations are done by the foreign organizations in the context of their local laws and corporate requirements.

Grassroots groups such as Creative Commons⁷⁶ and iCopyright⁷⁷ allow authors to determine how they want their works licensed and then provide tools for authors to indicate these terms as their works are distributed across the internet. While Creative Commons does not provide a means for creators to license their works for remuneration, iCopyright allows creators to set a price for the license or reproduction of their

⁷¹ ARTISTS RIGHTS SOCIETY, www.arsny.com (last visited Feb. 20, 2017); VAGA, www.vagarights.com (last visited Feb. 20, 2017).

⁷² For a complete list of artists represented by these two organizations, please visit their websites at <http://www.vagarights.com/artists-represented/> and <http://www.arsny.com/complete.html>.

⁷³ VAGA and ARS do not handle sales of the works of art done by their members.

⁷⁴ Copyright Clearance Center, www.copyright.com (last visited Feb. 20, 2017).

⁷⁵ THE AUTHORS REGISTRY, www.authorsregistry.org (last visited Feb. 20, 2017).

⁷⁶ CREATIVE COMMONS, www.creativecommons.org (last visited Feb. 20, 2017).

⁷⁷ ICOPYRIGHT, www.info.icopyright.com (last visited Feb. 20, 2017).

works.⁷⁸

Most songwriters and major music publishers are represented by performance rights organizations (PROs), of which there are four: the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), the Society of European Stage Authors and Composers (SESAC), and Global Music Rights (GMR). ASCAP and BMI are the two dominant collective licensing organizations in the industry.⁷⁹ ASCAP and BMI collect royalties for the public performance of musical works in the U.S. They also issue blanket licenses which authorize a user to perform all the music in the organization's repertoire for a set fee. SESAC is a similar organization which represents a wide variety of American songwriters and publishers, but unlike ASCAP and BMI, it is a for-profit organization and those wishing it to manage their catalogue must apply for affiliation. Founded in 2013, Global Music Rights is the youngest PRO and represents a "smaller client base."⁸⁰ Most of these organizations have searchable, internet databases where the public or others can search for the appropriate party from which to license the work. The Harry Fox Agency represents many music publishers and issues mechanical licenses and collects and distributes mechanical royalties due under section 115 of the Copyright Act.⁸¹ Harry Fox Agency's presence in the field is so strong that the mechanical licenses it grants – and those from others who issue mechanical licenses – are called "Harry Fox" licenses.

For sound recordings, SoundExchange is a nonprofit performance rights organization that collects section 112 and 114 statutory royalties on behalf of record companies and performing artists.⁸² These royalties pertain to digital audio transmissions of sound recordings, such as webcasting. (Nondigital transmissions are not covered by the public performance right in sound recordings. Nor is on demand streaming covered by the statutory license. Instead, the potential user must negotiate with the right holder of the sound recording.) SoundExchange is the sole administrative body for subscription services' statutory license fees. Its rates are set by the Copyright Royalty Board.⁸³

Photographers do not have a collective licensing group, although they have recently started a nonprofit initiative which will assist in the consistent management of image rights.⁸⁴ The Picture Licensing Universal System (PLUS) does not perform licensing functions. Instead, it provides a uniform lexicon and glossary (in many languages) for the photography community and those wishing to reproduce copyrighted photographs.⁸⁵ The PLUS website also has a search engine allowing potential licensees to locate the contact

⁷⁸ *Frequently Asked Questions about iCopyright*, iCOPYRIGHT, <http://info.icopyright.com/about-history-copyright-protection-issues/faqs> (last visited Feb. 20, 2017).

⁷⁹ ASCAP, www.ascap.com (last visited Feb. 20, 2017); BMI, www.bmi.com (last visited Feb. 20, 2017); SESAC, <https://www.sesac.com> (last visited Feb. 20, 2017); GLOBAL MUSIC RIGHTS, <http://globalmusicrights.com> (last visited Feb. 20, 2017).

⁸⁰ GLOBAL MUSIC RIGHTS, *supra* note 83.

⁸¹ THE HARRY FOX AGENCY, www.harryfox.com (last visited Feb. 20, 2017). A mechanical license allows one person to make phonorecords of a published non-dramatic musical sound recording in which they do not hold the copyright, provided they are making them for distribution to the public for private use only after an initial distribution of phonorecords to the public under the authority of the copyright owner. 17 U.S.C. §115(a)(1). These licenses are compulsory, meaning the original record company or artist does not have the right to deny the request, but they must be paid at the rate set by the Copyright Royalty Board, or as otherwise agreed. Because the terms of the compulsory license can be onerous, the parties often act pursuant to agreements.

⁸² SOUND EXCHANGE, www.soundexchange.com (last visited Feb. 20, 2017). Section 114 allows digital audio transmissions of copyright protected sound recordings for services such as webstreaming, pursuant to a statutory license. Licensees are required to meet certain conditions and to pay a royalty set by the Copyright Royalty Judges. §114(c)(D)(2). Section 112(e) allows the making of a copy of a sound recording to facilitate transmissions permitted under the section 114 statutory license, also at a rate set by the Copyright Royalty Board. *See* 17 U.S.C. §112(e).

⁸³ *See* 17 U.S.C. §112(e)(4) and 17 U.S.C. §114(f)(1)(B).

⁸⁴ THE PLUS COALITION, www.useplus.com (last visited Feb. 20, 2017).

⁸⁵ *The System: What is PLUS?*, THE PLUS COALITION, www.useplus.com/aboutplus/system.asp (last visited Feb. 20, 2017).

information for an image they wish to license.⁸⁶ Professional photographers often license their works through collective management groups called stock photo agencies.⁸⁷ Stock photo agencies differ from collective licensing societies in that stock photo agencies are for-profit businesses that are not set up primarily as royalty or fee distributors but as companies that license works, retain some of the license fees as payment for their services and remit the remainder to the photographer member. These organizations contract with the photographer to represent either his entire portfolio or just certain of his images. The stock photo agency then licenses the work on behalf of the author. Some of the images these agencies represent are available for license at the click of a button;⁸⁸ some are even royalty-free.⁸⁹

The major film and television studios grant public performance licenses of their full-length works (films and television shows) primarily through two groups: Swank USA and Criterion Pictures USA. These licenses include educational and non-educational uses. Swank issues licenses on a one-time basis, or an organization can ask for a license to cover multiple showings during a specified period of time. Swank does not handle requests for use of film or television clips. Studios handle requests for clips (as well as use of movie posters or related paraphernalia) on a case-by-case basis and there is no collective management system for these materials. Another organization, the Motion Picture Licensing Corporation, grants umbrella licenses to groups and corporations who wish to host multiple public performances of a copyrighted motion picture. This license does not cover showings where admission is charged or where specific titles are publicly advertised, whereas Swank licenses do cover these scenarios.

9. Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights?

For sound recordings, 17 U.S.C. §112 and §114 establish statutory royalty regimes on behalf of record companies and performing artists.

10. Which models for limitations and exceptions have been implemented in your national law?

As discussed above, 17 U.S.C. §107 establishes a “fair use” exception as a defense to copyright infringement.⁹⁰ The statute enumerates four factors to be reviewed in analyzing fair use: the nature of the defendant’s use, the nature of the copyrighted work; the amount and substantiality of the portions taken from the copyrighted work; and the effect of the taking upon the potential market for or value of the copyrighted work.⁹¹

The U.S. Copyright Act also limits reproduction, public performance, and display rights. According to Professors Jane C. Ginsburg and Robert A. Gorman, the U.S. Copyright Act limits the exclusive rights of copyright-holders in the following ways:

[It] permits many classroom, religious, and charitable performances and displays of copyrighted works.⁹² The statute exempts most live classroom uses, including the performance of copyrighted dramatic works.⁹³ Songs may be sung, and other musical compositions played, in most

⁸⁶ *Plus Registry*, THE PLUS COALITION, www.plusregistry.org/cgi-bin/WebObjects/PlusDB (last visited Feb. 20, 2017).

⁸⁷ Some examples of well-known stock photo agencies are Magnum Photos (www.magnumphotos.com), Corbis (www.corbis.com) and Getty Images (www.gettyimages.com).

⁸⁸ *See, e.g., News Imagery*, GETTY IMAGES, www.gettyimages.com/Editorialimages/News?isource=usa-en_home_FTV_quicklinks_news (last visited Feb. 20, 2017).

⁸⁹ *Id.*

⁹⁰ See our response to Question 8 above.

⁹¹ 17 U.S.C. §107.

⁹² 17 U.S.C. §110.

⁹³ 17 U.S.C. §110(2).

school settings –and also in a number of other non-commercial settings.⁹⁴ Instructional broadcasts, including in the form of “digital distance education” over the Internet, are also exempted from copyright liability if they meet statutory requirements.⁹⁵ The Act also provides that a public performance or display of a work through a transmission on a “home-type receiving apparatus” is not an infringement, if there is no direct charge to hear the transmission, and if there is no further transmission.⁹⁶ Essentially, this provision concerns the use by small commercial establishments of a radio to provide background music. Radio and television transmissions of music by larger establishments, using more sophisticated equipment, were exempted by Congress in a controversial 1998 amendment.⁹⁷⁹⁸

As discussed above, the rights of attribution and integrity also have exceptions and limitations. For example, “the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.”⁹⁹

Finally, the Copyright Act’s compulsory licenses set out at 17 U.S.C. §115, §118, and §1003 can be considered limitations in the form of compulsory collective management.

New York, New York
27 February 2017

⁹⁴ *Id.*

⁹⁵ 17 U.S.C. §110(2).

⁹⁶ 17 U.S.C. §110(5).

⁹⁷ The Sony Bono Copyright Term Extension Act, in addition to expanding the term of copyright for copyright holders, expanded the §110(5) “homestyle exemption” to include: “establishment[s with more than] 2,000 or more gross square feet of space...[and] food service or drinking establishment[s with more than] 3,750 gross square feet, provided that they comply with the §110(5)(B) equipment requirements. 17 U.S.C. §110(5)(B)(i)(I)-(II) and 17 U.S.C. §110(5)(B)(ii)(I)-(II).

⁹⁸ Gorman *et al.*, *supra* note 18, at 46.

⁹⁹ 17 U.S.C. §120(b).