**PROGRESSIVE COPYRIGHT THEORY**

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**ABSTRACT**

The legacy of colonialism, dispossession, and racial injustice underlies existing inequalities in modern copyright law. Traditionally, the main purpose of copyright laws has been to incentivize “progress” through the dissemination of new works, thereby conferring economic benefits to both the creator and society-at-large. Such economic-based notions of “progress” have historically favored the creative contributions of privileged groups while simultaneously disregarding those of historically oppressed groups. Scholarship on progressive property law has exposed the need to reevaluate the social obligations and interactions inherent in private property ownership. Progressive property theory acknowledges that legal regimes can perpetuate existing inequities, and thus, calls for a need to facilitate social transformation. This Article will examine how the application of progressive property theory may help address the doctrinal inequalities inherent in copyright law. This Article will specifically examine doctrines pertaining to copyrightability, such as authorship and originality, that have traditionally excluded protection of works created by historically marginalized groups. This Article proposes that copyright reformation can be informed by the principles of progressive property theory. By examining “progress” through the lens of progressive property theory, this paper advocates for social justice-oriented copyright law reforms.

**INTRODUCTION**

Copyright serves human values.[[1]](#footnote-1) It is intricately tied to important social, economic, cultural, and political structures that form our collective identities. The primary constitutional objective of copyright law is to “promote progress,” by striking a balance between the interests of creators with the interests of the broader public.[[2]](#footnote-2) Copyright has historically and predominately been justified through the lens of an economic incentive theory.[[3]](#footnote-3) This prevailing theory, rooted in utilitarianism,[[4]](#footnote-4) perceives copyright as primarily a mechanism to incentivize authors to create works for public consumption. It reflects the notion that the “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.”[[5]](#footnote-5) Over the past few decades, there has been ongoing discourse pertaining to the normative justification of copyright. From Kant to Hegel to Locke, scholars have engaged with multiple philosophies to justify intellectual property. The traditional justification of copyright, aimed solely at incentivization, has categorically proven to be an incomplete view of progress.

Scholars have continuously recognized that economic incentives are insufficient in addressing the broader objectives of “progress.”[[6]](#footnote-6) Many of these scholars have also broadened the conceptual framework of intellectual property to incorporate the advancement of human values.[[7]](#footnote-7) Professor Madhavi Sunder contention that copyright does “more than incentivize the creation of more goods…[it] fundamentally affect[s] human capabilities and the ability to live a good life,”[[8]](#footnote-8) facilitated a more expansive view of the role of intellectual property within our society. Within this conceptual framework, copyright must consider progress, not only through the lens of incentives, but in terms of how copyright can advance social goals. While legal theory loathes to “address specific processes of hegemonic struggle,” it is essential that theory addresses these concerns in order to modernize doctrine in our diverse and modern society.[[9]](#footnote-9) The advancement of these societal goals cannot be achieved without acknowledgement of the historic inequities and injustices that have pervaded copyright law. [[10]](#footnote-10) Consequently, copyright theorists must seriously challenge the hegemonic structures of traditional copyright theory.

In the past decade, the field of critical race intellectual property (“Crit IP”) has developed in response the racial and colonial biases inherent in the legal frameworks governing copyright, patent, and trademark.[[11]](#footnote-11) These works have acknowledged the expansive breadth of inequities that have permeated the application of intellectual property regimes to disadvantaged groups, particularly those of color. The emergence of Crit IP has exposed the way in which intellectual property laws, which have historically been considered as race-neutral, have reinforced cultural and racial hierarchies.[[12]](#footnote-12) It is within this framework that Crit IP scholars have advocated for the restructuring of IP frameworks in order to provide more equitable opportunities to use intellectual property for the benefit of marginalized communities. Building off the significant contributions of legal scholars such as Rosemary Coombe,[[13]](#footnote-13) Margaret Chon,[[14]](#footnote-14) Kevin J. Greene,[[15]](#footnote-15) Madhavi Sunder, Anupam Chander,[[16]](#footnote-16) Olufunmilayo Arewa,[[17]](#footnote-17) and Anjali Vats,[[18]](#footnote-18) among many others, this Article endeavors to reevaluate the role in which copyright theory has perpetuated these historical injustices. This Article proposes that the prioritization of economic incentives has resulted in the inequitable protection of copyrights for minority communities.

The recognition of property as both a cultural and racial construct informed much of the scholarship in the area of Crit IP.[[19]](#footnote-19) This reinterpretation of property allowed for more progressive ideas of how to shape property rights. The inception of “progressive property theory” was a novel theoretical mode of property law analysis that intended to challenge the dominant law and economics basis of property law theory.[[20]](#footnote-20) Progressive property theory provides that property rules should enhance the capacity of individuals to participate in the social and political life of a community.[[21]](#footnote-21) It challenges our common conception of property as “inadequate as the sole basis for resolving property conflicts or for designing property institutions.”[[22]](#footnote-22) Instead, progressive property theory provides that property is best served by looking at values that promote “life and human flourishing.”[[23]](#footnote-23)

Building upon this foundational proposition, this Article aims to apply progressive property theory within copyright law. In her seminal work *IP3*, Sunder reconceptualized the way in which intellectual property can be used to protect “human flourishing.”[[24]](#footnote-24) This Article intends to contribute to Sunder’s work by infusing the principles of progressive property theory within broader copyright theory. This theoretical framework will transcend the limitations of the incentive theory and the social relations theory, by provide a new modern and progressive copyright doctrine. The “progressive copyright theory” necessarily redefines copyright by inherent social obligation, values, and distributive justice. It advocates for a more equitable consideration of the creative rights of historical marginalized communities, which will in turn advance “human flourishing” of the broader community. Progressive copyright theory aligns with the goal of promoting “progress,” not only by considering economic incentives, but through fostering individual and communal growth.

Part I of this Article will provide an overview of the economic incentive theory and how it perpetuates inequalities in the application of copyright doctrine. It examines the focus of the economic incentive theory and its pervasiveness in copyright doctrine. It also addresses evolution of challenges to this theory and how scholars have offered other alternatives to address the inadequacies of this theory. This section will also explore the consequence of the economic incentive theory in perpetuating historical inequities to marginalized groups. Part II of this Article will examine progressive property theory and its contribution to the broader theory of property scholarship. This section will explore the foundation principles of progressive property theory offered by the seminal creators and how it has a transformative impact on property scholarship. Part III will provide normative framework for “Progressive Copyright Theory,” which provides the ways in which copyright can be framed within progressive property theory. Part IV will apply the normative principles of progressive copyright theory to copyrightability doctrines, which are the first, and most profound barrier to copyright protection for minority communities. By reinterpreting copyright through the lens of progressive property theory, this Article contributes to a more diverse and inclusive understanding of copyright that acknowledges the profound impact that copyright has on society, culture, and individual human capabilities.

1. **INEQUITIES AND THE ECONOMIC INCENTIVE THEORY IN COPYRIGHT LAW**

Article 1, §8, cl. 8 of United States Constitution empowers Congress to legislate copyright to “promote the Progress of Science and Useful Arts.”[[25]](#footnote-25) Through this constitutional mandate Congress may secure a limited monopoly for authors and “their respective Writings.”[[26]](#footnote-26) The way in which we interpret “progress” and the justification for copyright has been extensively debated in scholarship. Indeed, “ever since its origins, copyright has been characterized by a deep disagreement over its underlying justification.”[[27]](#footnote-27) The predominate rationale is that the constitution recognizes that copyright plays an important role in our economy by promoting market incentives to create.[[28]](#footnote-28) This economic theory has been the dominant framework through which we interpret the copyright clause. Indeed, Professor Sara Stadler, emphasized that “[n]othing is more fundamental to copyright law than the concept of incentives.”[[29]](#footnote-29) This section will provide an overview of the traditional law and economics approach to copyright and why this rationale exacerbates doctrinal inequities in copyright law.

1. **The Hegemony of Incentive Theory of Copyright**

Historically, copyright law in the United States has been primarily justified as an incentive for authors to produce works intended for public consumption. This utilitarian, economic justification “remains the dominant justification for copyright law.”[[30]](#footnote-30) The incentive theory of copyright advocates for a system that maximizes welfare. In exchange for the creation of creative works, the author receives exclusive rights over the use of the work, which allows them to charge high prices and limit access to their works.[[31]](#footnote-31) The implication of this theory is that copyright plays an inextricable role in our market economy. This approach to copyright provides a rationale for both “the existence of exclusive rights over information, in the form of copyright, and for the limited nature of those rights.”[[32]](#footnote-32)

Copyright law essentially represents an economic exchange between the creators and the public. Scholars frame this in terms of neoclassical economics as a “public goods” problem.[[33]](#footnote-33) Intellectual creations are seen as non-rivalrous (i.e. one consumer’s use does not prevent another consumer’s use) and non-excludable (no individual or group are excluded from using them)[[34]](#footnote-34) Public goods are believed to be prone to underproduction because of the “free rider” problem – a market failure in which there is an overabundance of individuals that sell copies of copyrighted work at a minimal cost.[[35]](#footnote-35) If an author does not have the right to exclude (i.e. the exclusive rights to their own creative output), “the result will either be nonproductive or nondisclosure.”[[36]](#footnote-36) The incentive-based approach does not inherently exhibit a preference for or against robust copyright protection.[[37]](#footnote-37) However, it contends that the more protection may lead to great costs on the consumers, which will in turn deter future creation and innovation. Thus, copyright law is required to strike a balance between encouraging creative production and allowing users to benefit from the very same creative production.[[38]](#footnote-38) Copyright’s incentive theory has been understood to operate as a form of “consequentialism,” whereby the “morality and legitimacy of the institution (i.e., copyright) is assessed entirely by reference to the consequences that it generates--that is, the incentives to produce creative expression and the creative output so produced.”[[39]](#footnote-39)

The incentive theory is considered “far and away the dominant theory of American copyright law.”[[40]](#footnote-40) In the many articles that cover copyright law, policy, and theory, much of the commentary has “some version of economic efficiency…is the crucial, if not the only, criterion for evaluating both the institution of copyright and the field that it regulates.”[[41]](#footnote-41) William Landes and Richard Posner’s seminal book *The Economic Structure of Intellectual Property Law* is considered “one of the most important book[s] ever written about intellectual property.”[[42]](#footnote-42) Its normative prowess has been expressly endorsed by the Supreme Court on multiple occasions.[[43]](#footnote-43) In *Mazer v. Stein*, the court stated that the justification for copyright under the Constitution is “[t]he 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 the public welfare through the talents of authors and inventors in science and the useful arts.”[[44]](#footnote-44) Similarly, in *Harper v. Row*, the court has reasoned “by establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.”[[45]](#footnote-45) Congress has similarly continued to understand copyright through the lens of economic incentives.[[46]](#footnote-46) However, modern scholarship has pushed back from the hegemonic economic-incentive based approach to copyright in favor of exploring how copyright can protect other values.

1. **Challenges to Law and Economics in Copyright**

In the latter part of the twentieth century forward, intellectual property scholars started to challenge the economic rationale of intellectual property. The dominant and repeated criticism is that intellectual creation is not solely driven by economic incentives and, as a result, this theory fails to consider the diverse motivations that underlie creative endeavors.[[47]](#footnote-47) Using psychology and behavioral economic studies, Diane Zimmerman pushes back against copyright’s incentive narrative. She suggests that creative production may likely be more related to devotion to that form of arts, as opposed to the promise of pecuniary gain.[[48]](#footnote-48) In fact, based on these studies, she provocatively advances the theory that “the promise of a reward to the performance of creative work can actually retard rather than encourage innovation.”[[49]](#footnote-49) Therefore, she advocates for policymaking that engages with skepticism towards incentive theory. Eric Johnson takes a more profound denunciation of this theory and deems it as an “incentive fallacy.” Similarly based in psychology and behavioral economics, Johnson argues that people are more naturally driven to create based on their own intrinsic motivations as opposed to extrinsic economic motivations.[[50]](#footnote-50) Johnson boldly prescribes that intellectual property should be “sunsetted,”so that protections are target to industry specific rights.[[51]](#footnote-51)

There are many other criticisms of the incentive model. At least one scholar has questioned the incentive theory as a rhetorical device to surreptitiously benefit large industry stakeholders.[[52]](#footnote-52) Some scholars have questioned whether social norms would provide incentives to create.[[53]](#footnote-53) Others have challenged the assumption that copyright protection increases the number of new works created through empirical data.[[54]](#footnote-54) A recent empirical study of copyright’s effect on the music industry concluded that more copyright revenue “did not lead to more and better music,” and instead, lead to lesser quality music.[[55]](#footnote-55) Professor Stephanie Plamondon Bair has also challenged this narrative by countering that extraneous social and psychological forces prevent potential innovators from production.[[56]](#footnote-56) She questions the ability of incentives to promote innovation in communities with large financial disparities.[[57]](#footnote-57)

Rebecca Tushnet has questioned the efficacy of the incentive model through examining the experiences of authors:

Psychological and sociological concepts can do more to explain creative impulses than classical economics. As a result, a copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote… As it turns out, commercially and critically successful creators resemble creators who avoid the general marketplace and create unauthorized derivative works (fanworks) when they talk about why and how they create.[[58]](#footnote-58)

Rebecca Tushnet has also suggested on that there is little evidence that copyright provides any economic benefit to the authors.[[59]](#footnote-59)

Other scholars have offered right-based alternatives to the economic Incentive theory. These theories parallel many of the same justifications for property.[[60]](#footnote-60) Some prominent scholars have advocated for a Lockean labor theory application to intellectual property law.[[61]](#footnote-61) Under this theory, authors deserve property rights in their creative productions by virtue of the labor and effort they put into the works’ creation.[[62]](#footnote-62) Other scholars have turned to Kant and Hegal to theorize personhood theory as the foundation of copyright.[[63]](#footnote-63) In particular, William Fisher has theorized that copyright is justified under notions of “just and attractive intellectual culture.”[[64]](#footnote-64) While, Neil Netanel contends that copyright is justified in order to upload values of democracy.[[65]](#footnote-65) Scholars have also challenged the incentive theory through the lens of postmodern social and cultural theory. Relying on this body of scholarship, Julie Cohen, for example, suggests that convention copyright analysis can lead to an oversimplification of copyright’s role in stimulating creativity and an underappreciation of the harm of “copyright maximalism.”[[66]](#footnote-66) By decentering creativity, Cohen believes scholars can have a “clearer understanding of the connections between copyright, cultural progress, and social justice.”[[67]](#footnote-67) Roberta Kwall similarly challenges the economic incentive perspective as one that “ignores the importance of non-economically-based motivations for innovation.”[[68]](#footnote-68)

Scholars, like Margaret Chon, are informed of notions of distributive justice in advancing intellectual property reforms.[[69]](#footnote-69) In Madhavi Sunder’s *IP3*, she criticized the incentive theory as one to “fail to capture fully the struggles at the heart of local and global intellectual property law conflicts.”[[70]](#footnote-70) She contends that the emphasis on the economic tradition of copyright fails to account for cultural life and human flourishing.[[71]](#footnote-71) Thus, she argues that intellectual property law should more broadly adopt social and cultural analysis.[[72]](#footnote-72) Since *IP3*, more scholars have considered intellectual property through the lens of distributive justice.[[73]](#footnote-73) These theorists understand intellectual property as a “tool for recognition and redistribution, development, and human rights” for those individuals consider “historically disempowered.”[[74]](#footnote-74)

A common characteristic among these scholars is their proclivity to critically challenge the efficacy of the incentive theory. Incentives do not represent the sole means of attaining the constitutional objective. Progress can only be achieved by redressing inequality while also striving to attain distributive justice. It is important to recognize that the incentive theory has not only proved unsuccessful in fostering creativity but has also exacerbated generational inequity in the creation and protection of creative works.

1. **Economic Incentive Theory & Inequality**

Copyright provides a property entitlement that has traditionally been defined by economic production.[[75]](#footnote-75) The underlying assumption of the Copyright Clause is that it is on its face “race-neutral.” It is deemed as “race-neutral” because copyright law is considered to exist only to the extent that it “foster[s] cultural productivity by providing economic incentives to individual artists/creators.”[[76]](#footnote-76) Ostensibly, copyright functions to incentivize creative works regardless of race, gender, or social status. However, the historically inequitable exclusion of women and minorities from copyright protections showcase applying copyright through the lens of the traditional economic-based incentive theory aided in this phenomenon.

Historically, commercial interests have been a key aspect of expanding copyright law protection. Britain passed the first copyright law in 1710, which was designed to provide incentives to printers and booksellers by offering them a limited monopoly over their reproduction right in order to advance their economic interests.[[77]](#footnote-77) At the end of the nineteenth century, the U.S.’s participation in international copyright system was driven in large part by commercial interests.[[78]](#footnote-78) From the initial copyright in England to its current Americanized version, copyright law was created without deference to large segments of society, including women and minorities.[[79]](#footnote-79) Indeed, the driving force behind copyright law was to help certain groups of people, mainly men, control “the resources generated by creative productivity.”[[80]](#footnote-80) While the incentive theory aims to incentive production, and therefore, derive economic benefits, the issue becomes whose production are we trying to incentivize? Do these incentives economically benefit a certain class of authors over others?

Copyright, like other aspects of American society, has always implicitly favored those of a certain race, gender, and socio-economic class. Because of the innate ability of copyright to reflect American culture and society, it predominately incorporates values of the dominant culture. Since the inception of copyright, scholars have documented discernable patterns of economic exploitation and cultural distortion of the creative works of minority creators.[[81]](#footnote-81) Through acts of cultural appropriation, dominant creators have had the ability to exploit minority innovators and obtain special economic and artistic benefits.[[82]](#footnote-82) Copyright law has offered little protection and indeed “market forces did not prevent the under-inclusion of minorities in the marketplace.”[[83]](#footnote-83) As a result, if “progress” is defined by pure economic returns, then it fails to account for the large amount of economic benefits that are taken from creators of color. The value of “incentives” thus masks a greater problem of economic and cultural exploitation of creators of color.

The focus on economics in copyright law has led to the valuation of some cultural production over others.[[84]](#footnote-84) Scholars acknowledged the way in which intellectual property has traditionally disenfranchised minority communities.[[85]](#footnote-85) The prioritization of financial gain and the protection of commercial interests has often been at the expense of broader cultural and social considerations. The resulting impact is that works seen as commercially viable are given precedence over those that are the culturally oriented productions, particularly those from marginalized communities.[[86]](#footnote-86) The entrenched values of white superiority has led some to surmise that “society would not generally value a work by a minority artist as much as the same work by a white artist.”[[87]](#footnote-87) As a result, there are instances throughout modern history where white artists who were seen as more “palatable,” were able to imitate black artists and reap vast financial benefits of those creations.[[88]](#footnote-88) According to Professor K.G Green, the lack of adequate protection, or in some instances, complete absence of protection for works by minority creators, “undermines the incentive theory of intellectual property laws.”[[89]](#footnote-89) The “innovation” that is encouraged thus is more as innovation to steal, as opposed to create.

Likewise, the focus on the individual to serve the common good conflicts with the traditions of many groups, that believe in group or communal creation. In these cultures, the “aesthetic and spiritual rewards, rather than economic rewards, may be a primary motivator for creating art.”[[90]](#footnote-90) Copyright law has aided in the deprivation of unquantifiable amount in royalties and other revenues for black Americans.[[91]](#footnote-91) As Green rightfully expressed “prolific exploitation of Black artists casts doubt on the value and neutrality of legally sanctioned economic incentives.”[[92]](#footnote-92) Copyright law does not protect the creative fruits of many labors of non-dominant cultures. Black Americans, in particular, have endured disproportionate economic and cultural exploitation and appropriation.[[93]](#footnote-93) According to Green, despite these disproportionate impacts, Black artists persisted to create original artistic works, even without compensation.[[94]](#footnote-94) For example, American slaves created “an impressive body of musical and artistic work, which like their labor, went uncompensated.”[[95]](#footnote-95) As a result, Green implies that individuals from non-dominant cultures similarly produce works even in the absence of pecuniary incentives.[[96]](#footnote-96)

Copyright law is limiting the cultural and artistic contribution of these marginalized groups through the over-incentivization of dominant group creative output. While wealthy males are the best represented group in copyright.[[97]](#footnote-97) A study by Bob Bob Brauneis and Dotan Oliar exposed a significant overrepresentation of white copyright owners in copyright registrations.[[98]](#footnote-98) The study revealed that Hispanic, Asian and Pacific Islanders, American Indians, amongst other ethnic minorities.[[99]](#footnote-99) Women are also underrepresented in copyright ownership.[[100]](#footnote-100) Based on these metrics, the incentive rationale appears to favor white males, while failing to offer equitable opportunities for minority groups. For Plamondon Bair, these numbers demonstrate two shortfalls for the incentive theory. First, intellectual property may be over-incentivizing wealthy white males.[[101]](#footnote-101) Second, since creative works reflect the backgrounds and experiences of their creators, there is likely a disproportionate of works reflecting particular demographic groups.[[102]](#footnote-102) The multiple societal harms that arise from the underrepresentation of these groups negates the efficacy of the incentive narrative. If minority populations are not represented in these creations, society is collectively missing a diverse range of creative output. If the contributions of these groups are necessary to achieve the incentivization goals of copyright, then this representation denotes a significant failure.[[103]](#footnote-103)

The economic incentive theory represents only a piece of the complex puzzle that defines the contours of copyright law. A dynamic and responsive approach to inequalities derived from copyright law require consideration of factors such as social relations, cultural diversity, social justice, and distributive justice. By acknowledging the capability of copyright law to foster social relations and shape social obligations, copyright law can better serve the broader interests of the public.

1. **PROGRESSIVE PROPERTY THEORY**

The 1971 New Jersey Supreme Court decision of *State v. Shack* marked a fundamental shift in property law jurisprudence.[[104]](#footnote-104) Departing from Blackstonian absolutism to a more socially enlightened idea of property ownership, the court held that the owner’s rights were limited, as “[p]roperty rights serve human values.”[[105]](#footnote-105) The decision is significant because it represents the acknowledgment that property rights will inevitably conflict with other vital interests, such as health, liberty, civil rights, and most notably economic interests.[[106]](#footnote-106) *State v. Shack* is considered a “progressive icon” in property law,[[107]](#footnote-107) given its purported protection of values and norms of non-owners. Progressive scholars utilized *State v. Shack* as a way to critique the prevailing influence of law and economics on existing property law canon. These progressive scholars advocated for the inclusion of more subjective human considerations in addition to the traditional analysis of costs and benefits. This movement emphasized the significance of lived experience when formulating normative theories of property. As a result, it became important to understand the diverse values at stake when looking at private property ownership. The inception of the progressive property theory provided this comprehensive framework for applying social values to disputes within the land use context.

1. **Origins And Principles: A Statement Of Progressive Property**

In 2009, the *Cornell Law Review* published the *A Statement of Progressive Property*, co-authored by four notable property law scholars – Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler.[[108]](#footnote-108) From this statement, bore what has become known as the “Progressive Property Movement.”[[109]](#footnote-109) In this statement, these esteemed scholars called for a new theoretical approach to property – one in which challenges the traditional and prevailing views of private property ownership.[[110]](#footnote-110) The heart of this theoretical approach is to alter the traditional notions of property that focus on individual interests and entitlement. Instead, the authors want us to look at the underlying values that are served by property. While the Progressive Property Statement is only two pages, its content is significant in its challenge of the traditional law and economics interpretation of private property ownership. The statement provides five principles that seek to challenge the classic law and economics approach to property. The authors provide an alternative mechanism to resolving property disputes. Instead of looking at pure economics, it is important to look at the underlying values that property seeks to serve.

The first principle of the Progressive Property movement is that “property operates as both an idea and an institution.”[[111]](#footnote-111) This principle criticizes the individualistic views of property rights that focus on exclusion and the unencumbered use of owned resources as “inadequate as the sole basis for resolving property conflicts or for designing property institutions.”[[112]](#footnote-112) The authors posit that alternatively, a comprehensive analysis of the “underlying human values that property services and the social relationships it shapes and reflects” is necessary to develop an enhanced property system.[[113]](#footnote-113)

The second and third principles espouse that “property implicates plural and incommensurable values.”[[114]](#footnote-114) Within this principle, the authors suggest that a thorough examination of the underlying values promoted by property include “life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, . . . wealth, happiness, and other aspects of individual and social well-being.”[[115]](#footnote-115) Within this framework, the authors criticize a singular metric-driven interpretation of property. Instead, the authors suggest that these values are “incommensurable,” as they relate qualitatively to distinctive aspects of “the human experience.”[[116]](#footnote-116) Consequently, property should be critically judged in a “non-deductive” and “non-algorithmic” manner.[[117]](#footnote-117)

The fourth principle articulates that “property confers power” and allocates necessary and scares resources for “human life, development, and dignity.” Due to distributional concerns, the institution of property must be observed as something that not only provides or confers resources but may also deprive.[[118]](#footnote-118) Because of this dichotomous power to both confer and deprive, the authors contend that “property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.”[[119]](#footnote-119) Lastly, the fifth principle emphasizes the ability of property to shape the life of a community. Indeed, the authors operate on the notion that “[p]roperty law can render relationships within communities either exploitative and humiliating or liberating and ennobling.” As such, the authors contend that property should be constructed through a framework that is appropriate “to a free and democratic society.”[[120]](#footnote-120)

The authors are not secretive in the difficulty of the considerations set forth in the Progressive Property Statement. They acknowledge, however, that “rational choice remains possible through reasoned deliberation.”[[121]](#footnote-121) Normatively, the authors suggests that the implication of morality within the concept of “human flourishing” necessitates a confrontation of our simplistic utilitarian measurement of individual gains and desires.[[122]](#footnote-122) Alternatively, property must be considered through a lens that seeks to best promote human flourishing. These considerations must be taken not on an individual level, but as it facilitates a robust communal life.

1. **Theoretical Orientation Of Progressive Property**

Simultaneous to the publication of *A Statement of Progressive Property*, these various esteemed property scholars published articles which expand on the theoretical orientation of progressive property theory. The collection of works by these scholars shows the contours of the progressive property movement. It is through this statement that the authors provide bold interpretations of how property law can play a role in the collective shaping of life. These articles are showcase a frustration with the law and economics approach to property.[[123]](#footnote-123)

1. *Alexander’s Social-Obligation Norm*

In his companion article, *The Social-Obligation Norm in American Property Law*, Professor Alexander contends that there is an inherent social-obligation norm that forms part of our U.S. property law system.[[124]](#footnote-124) While contemporary property jurisprudence has not fully incorporated this norm, Alexander argues that this norm should be reinforced. The Social-Obligation norm recognizes that property owners bear a responsibility to contribute to the advancement of a community. He argues that a “fully developed social-obligation norm requires some social vision, that is, some substantive conception of the common good that serves as the fundamental context for the exercise of the rights and duties of private ownership.”[[125]](#footnote-125)

This is grounded in the idea that “human flourishing” is intrinsically tied to community and social relations.[[126]](#footnote-126) Alexander argues that our identities are inextricably connected “to others with whom we are connected as members of one or typically more communities.”[[127]](#footnote-127) Communities, in turn, cultivate relationship within societies through the establishment of social norms that extend beyond individualistic interests.[[128]](#footnote-128) Alexander further argues that because every person is entitled to human flourishing, each individual also has an obligation to others in the community to promote the capability to flourish.[[129]](#footnote-129) Relying on Aristotelian tradition, Alexander rationalizes this obligation based various factors, including, the social character of humans, ideas of distributive justice, and self-interests.[[130]](#footnote-130) Ultimately, he concludes that because distributive justice seeks to give people the resources they need to develop the essential capabilities for living a well-lived life, it is necessary for human flourishing.[[131]](#footnote-131)

Alexander summarizes his major claim, “our (and others') dependence creates, for us (and for them), an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.” He further clarifies, “[w]e must protect important values like fairness, individual respect, and human dignity even as we recognize that community membership involves the possibility of unreciprocated sacrifices.”[[132]](#footnote-132) Within this theoretical framework, Alexander provides a general guide to consideration of the social obligation: “an owner is morally obligated to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing.”[[133]](#footnote-133)

Alexander divides his social obligation into two different categories: entitlement sacrifices and use sacrifices. Entitlement sacrifices are those activities that may be required of an owner to unwillingly relinquish all or some of their property rights.[[134]](#footnote-134) As an example of entitlement sacrifices, Alexander explores how eminent domain can be understood as a social obligation. Fundamentally, the process of eminent domain represents our “collective judgment” that the state has the right to require individuals who are part of the social and political community that supports their growth as “flourishing individuals” to relinquish ownership under specific circumstances.[[135]](#footnote-135) In return, those individuals who make those sacrifices are entitled to fair compensation, determined by the fair market value.[[136]](#footnote-136) From the perspective of the social obligation theory, eminent domain is not interpreted from the aggregation of social wealth, but rather “from the perspective of a substantive conception of the goods that are necessary to a well-lived human life and the social structures necessary to foster those goods.”[[137]](#footnote-137)

Use sacrifices, on the other hand, entails the activities that the property owner is expected to refrain or to engage in for the benefit of their neighbors. To explain use sacrifices, Alexander offers right-to-exclude cases to show the social obligation theory. Alexander examines the social obligation inherent in the case of State v. Shack, which required the court to determine the right-to-exclude two defendants who entered private property to aid migrant farmworkers housed and employed on the property.[[138]](#footnote-138) The court held that the property owner’s right to exclude was limited and must accommodate the interests of others, specifically those that were particularly vulnerable.[[139]](#footnote-139) The court’s acknowledgement of these quasi-property interests in Shack in favor of the “rootless and isolated” migrant workers, for Alexander, reinforces the notion that the owner has an obligation to contribute to the flourishing of others.[[140]](#footnote-140) Through both the use and entitlement sacrifices, the property owner’s enablement or prohibition derived from its social obligation defines the contours of the owner’s property interest.

1. *Peñalver’s Land Virtues*

In his companion piece, *Land Virtues*, Eduardo Peñalver’s also pushes back against the traditional law and economics-based approaches to property ownership.[[141]](#footnote-141) He criticizes the way in which theorists tend to focus on the maximation of market values of land as a vehicle to judge costs and benefits.[[142]](#footnote-142) His strongest critique of law and economics is that inability to engage with human behaviors.[[143]](#footnote-143) To Peñalver, activities intertwined with property ownership is not merely to maximize the monetary value of land.[[144]](#footnote-144) Instead, other non-economic values such as “ethical commitments, social pressure, and communal loyalty” ground much of the behaviors associated with property ownership. He argues that the law and economics framework fails to address these other values that are incommensurable in nature and impact land-use decisions.[[145]](#footnote-145) Peñalver illustrates the insufficiency of the market value approach through examining the way in which a gentrifying neighborhood may oppose gentrification, despite the possibility of a significant increase in the fair market value of the property.[[146]](#footnote-146) By relying on the “exchange-value maximation” as a theory of property ownership, Peñalver asserts that scholars “neglect the questions these other approaches raise about how best to divide land-use decision-making authority between individuals and the community so as to bring our land-use practices into greater harmony with our moral obligations.”[[147]](#footnote-147)

In this piece, Peñalver further adds to Progressive property theory scholarship through an engagement with virtue ethics. Peñalver’s conceptualization of virtues aligns harmoniously with the principles espoused in Alexander’s *Social-Obligation Norm*. He introduces the concept of virtues as “acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing.”[[148]](#footnote-148) Because virtues require “actors to weigh the consequence of their decisions for social wealth,” the virtue decision maker must “appreciate and assign the proper weight to the many subtle and incommensurable values (including economic values) implicated by their decisions.”[[149]](#footnote-149) Through the consideration of virtues, people may “strike the right balance between our obligations towards others and our inclination to favor our own interests.”[[150]](#footnote-150) Peñalver similarly situates his virtue theory of property within the context of human flourishing and social obligations. Peñalver ultimately contends that decision-making in property law must be broadened to encompass not only ideas of economic efficiency but to also promote virtue through industry, justice, and humility.[[151]](#footnote-151)

1. *Singer’s Democratic Estates*

Joseph Singer offers more context to progressive property theory in *Democratic Estates: Property Law in a Free and Democratic Society*. He recognizes property as not merely an individual entitlement, but also a “social and political institution” that cannot be expressed by “reference to the market value of property rights.”[[152]](#footnote-152) Instead, scholars must examine the ways which in which property law either supports or challenges democratic values.[[153]](#footnote-153) To Singer, progressive property scholars emphasize “understanding the role that property and property law play in a free and democratic society that treats each person with equal concern and respect.”[[154]](#footnote-154) Singer’s democratic approach recognizes property as concerning the relations among persons with respect to valued resources.[[155]](#footnote-155) As a result, ownership imposes obligations for both the owner and the broader society. Singer uses the right-to-exclude to demonstrate this point. When an owner has the right to exclude, it impacts others by imposing a prohibition on entering that land.[[156]](#footnote-156)

The democratic approach, according to Singer, understands property not as an individual right, but rather as a “social system.”[[157]](#footnote-157) Property law has formalistically been how we “define a legitimate social order…[which] means that certain property arrangements are defined as out of bounds.”[[158]](#footnote-158) Thus, Singer asserts that our property law system “operates with a combination of formal rules and social customs to shape property rights in a manner consistent with the norms of a free and democratic society.”[[159]](#footnote-159) Like Alexander and Peñalver, Singer argues against a reductionist approach to property law that looks merely at singular metrics of market value.[[160]](#footnote-160) Instead, market values are only useful if they are interpreted within the sphere of “legitimate social relationships.”[[161]](#footnote-161) In consideration of property’s relation to social relations, the democratic approach “recognizes that choices about property law are choices about social and political structure” and, thus, “we are obligated to consider the full range of human values we care about rather than merely thinking quantitatively about how to maximize preferences.”[[162]](#footnote-162) Finally, Singer reemphasizes the importance of social obligations that accompany ownership that Alexander and Peñalver promote.

1. **Subsequent Development of Progressive Property Theory**

Since the 2008 publication of the *Statement on Progressive Property*, the progressive property theory has undergone significant development. Numerous scholars have critiqued the practical implementation of this theoretical framework. One of the most notable developments is its application in domains extending beyond land use disputes, including such areas as intellectual property,[[163]](#footnote-163) digital assets,[[164]](#footnote-164) housing rights,[[165]](#footnote-165) and genetic materials,[[166]](#footnote-166) among various others. Despite its ongoing expansion, progressive property theory continues to be a dynamic and evolving field. This section will highlight several advancements that helped this theory evolve, enabling its further application to copyright law.

In his article, *The Ambition and Transformative Potential of Progressive Property*, Ezra Rosser presents a strong critique of Alexander, Peñalver, and Singer’s contributions to the foundation of the progressive property movement. His main contention is that these progressive property theorists “gloss over” the history of conquest, discrimination, and dispossession that conceived our modern-day property regime.[[167]](#footnote-167) In his criticism, however, Rosser actually contributes to progressive property scholarship by presenting “a fresh perspective on property's capacity to produce socially-ill and socially-beneficial effects.”[[168]](#footnote-168) He does this by providing examples of how property has both promoted and perpetuated oppression, specifically within the framework of indigenous title in the U.S.[[169]](#footnote-169)

In response to Rosser’s critique of progressive property theory, Timothy Mulvaney in his article, *Progressive Property Moving Forward*, calls for a reinterpretation of property law grounded in three themes: transparency, humility, and identity.[[170]](#footnote-170) When discussing transparency, Mulvaney emphasizes the need to acknowledge that property laws are not “value-neutral.” Consequently, it is important to consider why “one set of rules or standards over the alternatives are paramount.”[[171]](#footnote-171) By humility, Mulvaney refers to “lawmakers’ acknowledgment of the limited reach of human knowledge and the mutability of our normative positions.”[[172]](#footnote-172) What this implies is that normative positions regarding property undergo frequent change, primarily driven by evolving social ideas.[[173]](#footnote-173) Lastly, Mulvaney emphasizes the concept of identity, which refers to the social, economic, and politics needs of the group or individuals engaged in the disputes pertaining resource allocation.[[174]](#footnote-174) Here, Mulvaney’s focus on identity refers to how individuals can act in the best interests of their community to foster equality, as oppose to maximizing a community’s overall wealth.[[175]](#footnote-175)

The concepts set forth by Alexander, Peñalver, Singer, Rosser, and Mulvaney offer a more comprehensive and equitable theoretical framework, which contributes to the overall capacity for property to serve a stronger role in fostering progressive ideals. Progressive property theory represents a synthesis of value pluralism, communitarianism, and redistribution.[[176]](#footnote-176) First, progressive property acknowledges the connection between property ownership and the promotion of human flourishing depends on the implication of diverse and incommensurable values.[[177]](#footnote-177) Second, progressive property considers the importance of community well-being and the power of property to allocate power within communities.[[178]](#footnote-178) Lastly, progressive property advocates for more just distribution of resources in order to foster human flourishing.[[179]](#footnote-179) In sum, progressive property theorists approach property disputes through the consideration of pluralistic values, communal and collective interests, and redistribution.

1. **PROGRESSIVE PROPERTY THEORY AND COPYRIGHT**

Progressive property theory can be used as a tool within the context of copyright law to incorporate principles of progress as well as social justice. As stated above, the traditional economic incentive theory fails to account for the important societal interest that fall within the realm of copyright law. Copyright entitlements – or exclusive rights – need to be awarded not for the goal of wealth maximation, but to promote individual and communal development and capabilities. This requires a consideration of both ontological and deontological values that guide the determination of copyright ownership. While progressive property theory cannot settle all the issues that arise with copyright ownership, it may provide a more detailed and complete theoretical framework outside the mere economic incentive theory.

1. The Social Obligation in Copyright and Human Flourishing

Copyright impacts people. It ultimately is existing out of the conception of the human mind. As articulated by Professor David Opderbeck, “[i]ntellectual property is about human persons, human cultures, and human ideas. Persons, cultures, and ideas are more than epiphenomena of matter. Persons are more than utility maximizing machines; cultures are more than the sum of individual human beings or ideas, and ideas are more than discrete bits of unrelated data.”[[180]](#footnote-180) The impact of copyright on global culture and development makes it necessary that we look at the social relations and the way in which copyright impacts of society at large. Carole Rose considers property as “one of the most sociable institutions that human beings have created, depending as it does on mutual forbearance and on the recognition of and respect for the claims of others.”[[181]](#footnote-181) Copyright is also a social institutional, which provides for the forbearance and recognition of one another’s rights.

1. *Intellectual Property as Social Relations*

Within the past decade, a rich body of literature has grown in the United States that perceives the law as an extension of our social relations.[[182]](#footnote-182) Philosophical anthropologist Mikhail Bakhtin, deemed one of “the great theoretician[s] of literature in the twentieth century,”[[183]](#footnote-183) understood the role of individual and society “not as a binary opposition, but as a continuum.”[[184]](#footnote-184) The law shapes the formation of our cultural norms, as well as the way in which individuals cognitively comprehend their social relations.[[185]](#footnote-185) Intellectual property scholars have argued that a “property as social relations” approach could be useful in overcoming the flaws of the law and economics theories.[[186]](#footnote-186) To understand the social obligation of copyright, it is important to look at how social relation theorist and intellectual property scholars have viewed the ways in which intellectual property can be viewed through a social lens. This requires a consideration of how intellectual property laws can be developed to accommodate human flourishing and to provide as many people as possible access “to a life consistent with that vision.”[[187]](#footnote-187)

In Professor Sunder’s article *IP3*, she envisions a new intellectual property scheme, arguing that intellectual property rights “structure social relationships and enable, or disable, human flourishing.”[[188]](#footnote-188) While she applies a very similar approach to Alexander, her article actually predates the official progressive property movement.[[189]](#footnote-189) Relying on Amarya Sen and Martha Nussbaum “capabilities approach,” *IP3* harnesses culture, technology, and economics to offer normative guidance for resolving intellectual property disputes.[[190]](#footnote-190) Intellectual property laws enable and constrain the ability of individuals to engage in social relations.[[191]](#footnote-191) Sunder asks intellectual property decision-makers to “pay heed” to the social relations theory of property in a number ways. Sunder acknowledges that decision-makers take into account social effects when creating, limiting, and distributing property rights.”[[192]](#footnote-192) Property as social relations further recognizes unequal power relations and seeks to prescribes rules that rectify these imbalances.[[193]](#footnote-193) Sunder emphasis the need to have similar applications in intellectual property. She emphasizes that a theory of intellectual property as social relations must recognizes conflicts between one’s intellectual property rights versus the personal rights of another, which may lead to profound inequities.[[194]](#footnote-194) Sunder ultimately states that the intellectual property as social relations approach must account for the existing economic, social, and cultural inequities.[[195]](#footnote-195)

Similar themes that consider the human dimension of intellectual property right can be found in literature that highlights human rights and intellectual property.[[196]](#footnote-196) Peter Drahos, for examples, believes that “viewing intellectual property through the prism of human rights discourse will encourage us to think about ways in which the property mechanism might be reshaped to include interests and needs that it currently does not.”[[197]](#footnote-197) Similarly, Professor Paul Torremans commented that “not only do [intellectual property rights] need to exist to facilitate cultural participation and access to the benefits of scientific progress, they should also make sure that the other components of the relevant articles in the international Human Rights instruments are respected and promoted.”[[198]](#footnote-198) J. Janewa Osei-Tutu most notably considers the human rights framework of intellectual property “moves the analysis from one dominated by the property interest to one which considers the rights of various individuals in the community.”[[199]](#footnote-199)

Embedded in American intellectual property law is a broader social purpose – “to encourage the progress of science and the useful arts.”[[200]](#footnote-200) In considering our views of “progress,” little is paid attention to the communitarian or collective view of “creations.” Alexander explains that our identities are inevitably bound up in the communities to which we belong.[[201]](#footnote-201) Intellectual property law must take into account how art, cultural heritage, and creative output can be personal and deeply intertwined in the community. Creative output is supposed to serve a common good. It also allows for the pursuit of knowledge, which allows individuals to engage in acts of self-discovery and self-autonomy. Communities are inextricably intertwined with the individuals that comprise them. However, communities are not just a collection of individual interests; rather they encompass interrelated collective interests that derive from shared characteristics that constitute the community. As a result, when harm – through exploitation or appropriation – occurs, it harms not just the individual, but the community as well. This may be the case even if one individual in the community benefits. While “writings and inventions” may be produced by one individual, the constitutive impact widely impacts community.

1. *Copyright’s Social Obligations*

In addition to examining copyright and its implications to various social relations, it is similarily imperative to consider the social obligations of copyright owners and users. Promoting progress under the progressive property theory requires us not to look at the maximation of wealth, but rather to provide the resources necessary for human flourishing and community. Professor Thomas Berg “[i]ntellectual property, like other forms of property, serves important purposes related to human dignity, productivity, and especially creativity.”[[202]](#footnote-202) He further argues limits on intellectual property are “equally important,” particularly where such limits are “important to benefiting and empowering the poor.”[[203]](#footnote-203) Madhavi Sunder states that “the turn to intellectual property for the poor is not simply another instance of a misguided 'if value, then right' mentality . . . poor people's turn to property is surely about economics, but is about social and cultural values as well. . . . People, rich and poor alike, want recognition of their creativity and contribution to science and culture.”[[204]](#footnote-204) Drawing on examples from mashups to fanfiction, Sunder illustrates how intellectual property is central to advanced cultural and economic development.[[205]](#footnote-205) Basic human necessities like the right to life, freedom of movement, creative work, and participation in social, economic, and cultural institutions aid to human flourishing. As a result, she opines “[r]ecognizing people's humanity requires acknowledging their production of knowledge of the world.”[[206]](#footnote-206)

Alexander understood the importance of community and social structures within copyright law. He acknowledges that creators of copyrighted content rely on various social structures to enable the creation of their works.[[207]](#footnote-207) For example, creators of copyright depend on ideas or previous works to enable them to create their new work. As a result, the dependence on these social structures:

means that the copyright owner or license holder, because of their dependency on members of their communities, owes obligations to a wide range of persons to nurture the capabilities necessary for those persons to flourish. It also means that as members of those wide and ever-expanding networks flourish, the artists themselves flourish by virtue of the feedback effects of flourishing networks.”[[208]](#footnote-208)

This synergistic social obligation then informs how copyright owners versus copyright users can engage with copyrightable materials.

Copyright can fit within Alexander’s entitlement sacrifices as a distinct social obligation. Alexander discussion “entitlement sacrifices” in the context in which property owners may be required to unwilling relinquish some or all of their property rights.[[209]](#footnote-209) While the conventional explanation for these forced relinquishments were to maximize economic efficiency, Alexander explains that they may also be viewed as a reflection of the social obligation connected with private property ownership. [[210]](#footnote-210) Providing individuals with the exclusive rights over certain creative works supports their growth as “flourishing individuals” to engage in the creative process. At the same time, this entitlement represents our “collective judgment” that these certain works are excluded from commercial exploitation by our social and political community. However, copyright imposes limitations on these exclusive rights in order to advance broader social objectives. By affording authors their “limited proprietary entitlement,” copyright law “frees them from reliance on patronage and cultural hierarchy, while opposing market-based hierarchy and encouraging transformative uses of existing works. In that way copyright law hopes to generate diverse and autonomous contributions to our common discourse.”[[211]](#footnote-211)

An example of entitlement sacrifices in copyright can be seen in the compulsory licensing scheme.[[212]](#footnote-212) Congress has the ability to both provide specific exclusive rights and mandate terms in which uses of certain uses can be licensed to the public without the copyright owner’s permission. Compulsory licenses have often been perceived as a necessity to remedy market failures related to transaction costs.[[213]](#footnote-213) However, the compulsory licensing scheme allows Congress to “both reaffirm author incentives and also guarantee widespread public engagement in a particular use of copyrighted material.”[[214]](#footnote-214) Like eminent domain, the process of compulsory licensing may potentially cause financial harm to the copyright owner, however it provides a particular social value. As a result, the implementation of this licensing scheme guarantees that the copyright holder receives a certain amount of compensation, while still allowing the particular use to be carried out.[[215]](#footnote-215) This, according to Lateef Mtima, allows Congress to subordinate “author incentive/property interests to the overarching copyright social utility that can be achieved in facilitating certain unauthorized uses of copyrighted material.”[[216]](#footnote-216) Within this vein, compulsory licensing play a socially significant role in not only proving access to creative works, but allowing more engagement in the copyright material from those that may categorically be priced out of licensing.[[217]](#footnote-217) This licensing scheme has been a way for congress to mitigate some of the social costs imposed by author’s exclusive hold over their creative works.[[218]](#footnote-218)

Additionally, the concept of “use sacrifices” – where property owners are expected to make sacrifices in their use of their property for the benefit of the collective whole – parallels the way in which copyrightable content is maintained. Fair use, which allows certain copyright material to be considered outside the realm of protected expression, reflects this idea.[[219]](#footnote-219) An author’s exclusive rights are limited if a certain use is recognized as “fair.”[[220]](#footnote-220) The law recognizes that some uses are permissible in order to provide a wider social and public benefit.[[221]](#footnote-221) This is a way to reconcile the rights of the copyright owner, while simultaneously fostering important values such as freedom of expression, criticism, and education. While the fair use doctrine has been justified as a transaction-cost-minimizing mechanism,[[222]](#footnote-222) scholars have more recently recognized the social value of the fair use doctrine.[[223]](#footnote-223) For Alexander, the social-obligation norm “supports a capacious fair use doctrine [because]…[c]opyright owners and their licensees owe obligations to members of their communities to promote those capabilities that are essential to human flourishing.”[[224]](#footnote-224) In return, the copyright owner receives “feedback effects on the development of the copyright owners themselves.”[[225]](#footnote-225)

Additionally, users of copyrightable material must make sacrifices to ensure that they are in compliance with copyright law, as part of this exchange between the rights of creators versus the rights of the public to engage with the copyrighted material. As articulated by Alexander, copyrighted works “contribute to several of the essential human capabilities, including practical reasoning (through education), freedom (also through education), and sociability.”[[226]](#footnote-226) While an individual may own a physical object, they do not have the absolute right to use the material which may infringe upon the exclusive rights of the copyright holder. The user’s property right in the actual physical object is subject to both a legal and social obligations implicated by copyright law. Through both the use and entitlement sacrifices, a copyright owner and a user of copyrightable content must engage in behavior that supports the social obligations and provide for human flourishing.

1. Copyright Values Beyond Incentives

Progressive property aims to incorporate various types of values, thereby avoiding “the concerns associated with using value-monist utilitarianism as its operative framework.”[[227]](#footnote-227) Progressive property theory requires an analysis of various values implicated by property ownership. Because its ability to embrace multifaceted and incommensurable values associated with copyrights, it is particularly useful in looking at complex matter associated with ownership of copyrights. In discussing various virtues inherent to property ownership, Peñalver provided the virtues of industry, distributive justice, charity, liberality, moderation, and humility. Singer’s democratic model of ownership further incorporates other distinctive virtues, including autonomy, mobility, distribution and access, freedom of contract, stability, and change. Through a consideration of pluralistic view, there can be a more balanced and socially considered framework of copyright. This balanced framework respects both rights of creators and the broad interests of society.

The acknowledgement of certain values within the sphere of intellectual property has been discussed by some scholars. Sonia Kaytal has explained intellectual property is uniquely situated to govern the “most intimate aspects of the representations of human life, including the depiction and commodification of racial, sexual, ethnic, and political identities.”[[228]](#footnote-228) Professor Sunder has explained that “intellectual property should consider values beyond simply the value of incentivizing production…intellectual property must adopt broader social and cultural analysis.”[[229]](#footnote-229) For example, Sunder has identified multiple values inherent in intellectual property including efficiency, personhood, dignity, liberty, fairness, and distributive justice,[[230]](#footnote-230) as well as autonomy, culture, democracy, equality, and economic development.[[231]](#footnote-231) In order to consider ideals of social justice and equality, this author proposes non-exhaustive virtues that should be considered, including democratic culture and freedom of expression, diversity, representation, and belonging, and preservation and access. An examination of these values will strike a balance between the protection of the rights of creators versus the preservation and enrichment of creative output. Our interpretation of progress could, as Betsy Rosenblatt opines, “easily embrace ideas of human flourishing that may be harder to measure than the quantity (or even the quality) of inventions, marks, and works of authorship. Just because these notions are less countable does not make them less important.”[[232]](#footnote-232)

1. *Democratic Culture & Freedom of Expression*

Culture is a core value associated with copyright ownership.[[233]](#footnote-233) Copyright law significantly impacts culture, as many of the images that have become so deeply engrained in our society are protected by copyright.[[234]](#footnote-234) Culture is not merely a commodity, but rather a fundamental component of human flourishing.[[235]](#footnote-235) Sunder classifies “intellectual property” as “one of the most important legal tools for regulating the production and circulation of culture.”[[236]](#footnote-236) Culture is a dynamic construct, fostering not only societal exchanges, but also exercise of democratic ideals. For Rosemary Coombe, “[m]any interpretations of intellectual property laws quash dialogue by affirming the power of corporate actors to monologically control meaning.”[[237]](#footnote-237) As a result, Coombe it is critical to consider the relationship between law, culture, and politics when considering the commodification of cultural forms.[[238]](#footnote-238) According to Jack Balkin, “democratic culture” is particularly imperative, as it enables individuals to actively engage in both political and cultural system that govern our society.[[239]](#footnote-239) Because culture plays a significant role in shaping various aspects of our lives, we must recognize the value in which engaging with culture can promote our democracy.

In *Copyright and a Democratic Civil Society*, Professor Niel Weinstock Netanel outlines two ways in which copyright supports a democratic society.[[240]](#footnote-240) First, he argues that the “production function”[[241]](#footnote-241) encourages creativity on various issues pertaining the political, social, and aesthetic life.[[242]](#footnote-242) Because commercial entertainment (and the visuals and sounds that accompany it) exerts a significant influence on our social norms, it has become a valuable resource in the expression of democratic culture and civic engagement.[[243]](#footnote-243) Second, he contends that the “structural function” or copyright serves to further public discourses necessary for political participation.[[244]](#footnote-244) Copyright serves the promotion of this democratic function in two fundamental ways: “[i]t undergirds a sector of expressive activity that is independent from state and elite patronage and it sets limits on private control of creative expression.”[[245]](#footnote-245) Through these production and structural functions, copyright law facilitates the dissemination of knowledge necessary to actively engage in civic and community affairs, thereby promoting a democratic civil society.[[246]](#footnote-246)

Sunder’s theory of “participatory culture” is particularly pertinent to the understanding of values inherent in copyright ownership. Participatory culture, as defined by Sunder, is “a means to challenge oppressive cultural constraints that negatively affect both individual liberty and social status.”[[247]](#footnote-247) Such subversion of these cultural limitations can be accomplished through the resistance of hegemonic societal structures. Communication on culture can shape identities, transmit cultural knowledge, and achieve mutual understanding.[[248]](#footnote-248) Participation within the cultural can foster learning and cultivate the qualities necessary for a functioning democracy.[[249]](#footnote-249) As a result, when individuals engage in discursive conduct, such as critique, comment, or parody, against dominant culture, they are engaging in a form of “cultural dissent.”[[250]](#footnote-250) Copyright law must therefore protect the ability of individual groups to engage in alternative viewpoints, challenge dominant narratives, and engage in critical discourses. As explained by Anthony Appiah, it is the role of the artist “to disturb us and make us dissatisfied with our habitual life in culture.”[[251]](#footnote-251)

1. *Diversity, Representation, and Belonging*

Diversity is a value that plays a fundamental role in copyright.[[252]](#footnote-252) The identity of the author is significant. Cultural representation, “in the form of who is represented, how, and under what terms…affects economic and social power and relations, and vice versa.”[[253]](#footnote-253) Power, both socially and politically, derives from the capacity to exercise control over discourses.[[254]](#footnote-254) For those from historically marginalized communities, whose cultural contributions have historically been appropriated by dominant speakers, the significance of this value cannot be overstated. Copyright can only support a democratic civil society if protected expression is autonomous and diverse.[[255]](#footnote-255) As articulated above, copyright values the preservation and promotion of cultural expressions. Those cultural expressions ostensibly should incorporate diversity not just in mediums of expression, but cultural diversity as well.[[256]](#footnote-256) Diversity serves the dual purpose of rectifying past injustices while also facilitating “greater choice among a range of options within our normative communities.”[[257]](#footnote-257) As a result, promoting diverse voices ultimately serves utilitarian functions in allowing a more diverse range of perspectives to be represented within the cultural and societal landscape.

The ability to challenge dominant cultural discourses is especially significant for those in marginalized communities, who have not traditionally had the power to control narratives about their own cultures.[[258]](#footnote-258) Likewise, copyright entitlements liberate an author from the dependence on “patronage and cultural hierarchy,” allowing authors to oppose hegemonic structures through creative works.[[259]](#footnote-259) In many instances, marginalized groups lack the ability to control their own cultural output, as well as their own images and identifies.[[260]](#footnote-260) Additionally, these marginalized groups also serve as fetishized objects of cultural output from dominant creators.[[261]](#footnote-261) Because “minorities internalize the stories they read, see and hear every day,” it can become particularly harmful when there is no outlet to counteract negative narratives. A study conducted by the U.S. Civil Rights Commission revealed that minority stereotypes perpetuated the negative perceptions that minorities have about themselves.[[262]](#footnote-262)

The power to control narratives around their own cultures is an “important implication of equality”[[263]](#footnote-263) As Salman Rushdie eloquently articulated, “those who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct is, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts.”[[264]](#footnote-264) For example, the portrayal of life on a slave plantation has been lionized through Margaret Mitchell’s story of Gone with the Wind. Alice Randall “disturbed” the idyllic storytelling through the creation of work that provided the perspective of a slave protagonist at the planation. The US court held that the Wind Done Gone to be “fair use” of the original. Sunder calls the importance of this particular case by stating that this case “represents a shift in the distribution of power in cultural production and meaning-making.”[[265]](#footnote-265)

While the copyright clause has not traditionally been interpreted to incorporate diversity as a value, diversity now exists as part of a broader legal and cultural framework. As other scholars have argued copyright is shaped by social values, which also concern the inclusion and respect for diverse creative expressions. Sunder’s depiction of fair culture is also normatively significant when considering about diversity as a value of copyright.[[266]](#footnote-266) For Sunder, “fair culture” aims to promote cultural exchange by ensuring intellectual property is used in a socially just manner.[[267]](#footnote-267) The achievement of “fair culture” can be realized in various ways. First, recognition and reward of copyrights to diverse authors who have historically been outside the confines of copyright law. This may require a reconsideration of the categorical qualifications of what we consider copyrightable. Second, recognition of vulnerability to exploitation. Meaning that some from disadvantaged communities may not want to share in their creative output due to historical inequities in protection. Copyright must recognize these past injustices in order to support cultural production of diverse communities.[[268]](#footnote-268)

1. *Preservation & Access*

Preservation and access are engrained values within the framework of copyright. Preservation and accessibility of creative works ensure our continued understanding of individual and collective identities.[[269]](#footnote-269) Preservation allows us to understand our social, cultural, political, legal, and literary past. Likewise, access enables the wide range of creative content to draw inspiration from others. Because preservation and access are so important for the creation of new works, and for our society at large, it is imperative to balance these values with the others proposed in this article.

Scholars have recognized that preservation and access are critical for a well-functioning copyright system.[[270]](#footnote-270) While the Copyright Act does not explicitly state preservation as a value or an important goal, it can be argued that the very existence of copyrights fosters preservation. One of the primary objectives of copyright is to allow the copyright owner to create and disseminate copies of their creative works. The promotion and creation of circulated physical copies of creative works allows multiple owners to possess the same creative work, ensuring that work will continue to survive.[[271]](#footnote-271) As underscored by Jessica Litman “in order for the creation and dissemination of a work of authorship to mean anything at all, someone needs to read the book, view the art, hear the music, watch the film, listen to the CD, run the computer program, and build and inhabit the architecture.”[[272]](#footnote-272) According to Professor R. Anthony Reese, who has written extensively on preservation and copyright, “[p]reserving copyrighted works obviously benefits future audiences, who will have the opportunity to enjoy those works….It also benefits future authors who can, as authors have done for millennia, draw on earlier works to create new works.”[[273]](#footnote-273) Thus, essentially “makes a promise to future generations” that “if an author today creates a work - a book, a song, a film, a play, a photograph, a painting - then sometime, a long way down the road, that work will pass out of copyright protection.”[[274]](#footnote-274)

Copyright contains both proscriptive and permissive rights that provide for dual values of preservation and access to creative works.[[275]](#footnote-275) For example, in order to register a copyright, an owner must deposit a copy of the creative work at the copyright office.[[276]](#footnote-276) This requirement has been considered “consistent with the preservation of cultural heritage and with copyright’s constitutional copyright purpose to ‘promote the progress of science,’ by which the Founders meant knowledge.”[[277]](#footnote-277) Likewise, the expansion of the exceptions under §108,[[278]](#footnote-278) which authorizes libraries and archives to reproduce and distribute works for purposes of preservation, is a an example “of Congress building preservation thinking into intellectual property infrastructure.” [[279]](#footnote-279) Conversely, the idea-expression dichotomy ensures that, by not extending copyright to ideas, the underlying idea remains in the public domain. The public domain operates in a socially optimal way by “assuring that sufficient cultural material remains available for the creation of future works.”[[280]](#footnote-280) The requirement that a work be created in a “fixed medium of expression” has be rationalized under the goal of “cultural preservation” to ensure that “relevant expression will be passed from place to place, person to person, and generation to generation. [[281]](#footnote-281)

1. Distributive Justice & Copyright

Part of the calculus to be considered in applying progressive property theory to copyright law is the issue of fairness in distributive justice. Distributive justice has been understood as a fair distribution of resources so that each citizen can develop their own capabilities.[[282]](#footnote-282) Applying this theoretical approach of copyright law, we must consider social and communal goals beyond wealth maximization and advances “a vision of a just and attractive culture.”[[283]](#footnote-283) While copyright is not instinctively designed for redistribution, a progressive property approach to copyright seeks to consider distributive impacts on the community. This would allow a fairer allocation of copyright entitlements. When individuals or entities make sacrifices for the common good, it is important that those sacrifices are proportionately distribute as to not disproportionately burden marginalized groups. The existence of community can create obligations to community members that are necessary for human flourishing. Not looking at only self-interest but looks at consider how other people are impacted. Progressive property theory aligns with concepts of distributive justice. A progressive property theory framework understands property entitlements through a social dimension, emphasizing the importance of broader goals of the community. While distribution justice refers to the fair allocation of resources among members of the community at large. Progressive copyright theory should then consider distributive justice in determining how rights of copyright owners and users are supported for human flourishing.

Distributive justice has been more recently favored as a way to reallocate benefits and burden within intellectual property law.[[284]](#footnote-284) Within a distributive justice framework, Justin Hughes and Robert Merges have argued that copyright protection has the capability to address core distributive justice concerns especially for society's most disadvantaged groups.[[285]](#footnote-285) Hughes and Merges argue that merely participating in “IP-dominated fields benefits authors economically and socially regardless of whether they end up owning the resulting IP rights.”[[286]](#footnote-286) While Hughes and Merges attempted to establish distributive justice as an independent rationale for copyright, scholars have critiqued this approach because of the “risk that copyright may over-reward our superstar artists and authors.”[[287]](#footnote-287) However, according to Betsy Rosenblatt, distributive justice “favors a level of protection sufficient to fund creation by creators of all wealth levels, but it also favors ample access by even the most poorly funded of consumers.”[[288]](#footnote-288) This, in turn, will encourage the dissemination of works in a way that “creates a net benefit to society at large.”[[289]](#footnote-289)

Hughes and Merges engage in discussions about the application of Rawlsian deontological theory of distributive justice in copyright.[[290]](#footnote-290) Rawl’s theory of social justice can be reconciled with the distributive goals of progressive property theory. Rawl’s theory of social justice “mandates that the rules that govern individuals in society must allocate rights and opportunities fairly, and tolerate inequities only to the extent that they serve a measure of distributive justice.”[[291]](#footnote-291) This parallels with progressive property theory which looks at property allocation, not from the perspective of aggregate welfare, but which “allocation will afford community members basic rights and resources necessary to live fulfilling lives.”[[292]](#footnote-292) Thus, under a progressive copyright theory, allocation of copyrights, as well as exceptions to those rights, must consider the distributive effect.

For example, scholars have criticized the commercial exploitation and appropriation of indigenous cultural heritage.[[293]](#footnote-293) The expropriation of such indigenous heritage has been justified for utilitarian purposes, allowing a broader sphere of creators to create works based on indigenous creative resources. However, such a utilitarian approach fails to acknowledge the detrimental impact that these unauthorized uses have on indigenous communities. Under a progressive copyright approach, ownership of indigenous cultural heritage will consider the communal impacts on appropriation and reconsider the ways in which the law can protect indigenous cultural expressions. Through a fairer allocation of these cultural resources, distributive justice can facilitate communal flourishing.

1. **COPYRIGHTABILITY THROUGH THE LENS OF PROGRESSIVE COPYRIGHT THEORY**

There is a rich body of scholarship that criticize intellectual property law for its inherent racial and neocolonial hierarchies. These hierarches are entrenched by doctrines that limit the way in which copyright can protect non-dominant cultures creative output and operate more potently to protect the superiority of Anglo-American culture. The classic Westernized idea of copyright requires originality, fixation, and authorship.[[294]](#footnote-294) These Eurocentric doctrines reinforce an artificial hierarchy of expressions by excluding protection of historically marginalized groups.[[295]](#footnote-295) A “progressive copyright” theoretical framework seeks to strike a balance between over-protection of Anglo-American expression versus exploitation of minority cultural output. Applying the normative principles of progressive copyright theory to copyrightability standards is important as copyrightability is the first, and most profound, barrier to copyright protection for minority communities.

1. *Originality*

Section 102 of the 1976 Copyright Act provides that copyright subsists exclusively in “original” works of authorship.[[296]](#footnote-296) The Supreme Court in *Feist Publication, Inc. v. Rural Telephone Service* definitively pronounced originality as the “*sine qua non* of copyright.”[[297]](#footnote-297) The court enumerated the requirement that originality exists if the work “ was independently created by the author…and that it possess some minimal degree of creativity.”[[298]](#footnote-298) While originality is seemingly *de minimis* in the quantum of creativity required, it has historically worked to exclude many forms of creative works that do not confine to Westernized ideas of creativity. It has been deemed a “site of privilege and bias,”[[299]](#footnote-299) as well as “a highly contested idea in the West.”[[300]](#footnote-300)

For example, originality has been seen as in “strict opposition to indigenous notions of creations.”[[301]](#footnote-301) Christine Farley has outlined the ways in which indigenous art may not fit within the traditional confines of originality. She describes the production of indigenous art as “a process of reinterpretation.”[[302]](#footnote-302) Because many works of indigenous art are similar to preexisting texts passed down by generations, they will receive little to no copyright protection. Because these works may be considered in the public domain, they are vulnerable to exploitation.[[303]](#footnote-303) The low threshold for originality has also been opined to exacerbate exploitation of minority expression. K.G. Green has argued that the minimal degree of creativity has penalized the “most innovation creators of copyrighted works.”[[304]](#footnote-304) In referencing African American composers and performers, Green contends that copyright puts innovators at a disadvantage because such a minimum degree of originality offers little protection against appropriators of style.

The dichotomous effect of the originality requirement results in exploitive treatment of two distinct minority groups. The failure to protect indigenous works results in the ability of dominant groups to exploit indigenous works because they are considered too “unoriginal” and thus are part of the public domain.[[305]](#footnote-305) While too low of a threshold of originality permits dominant groups to add very limited differences to a work and claim it as their own. In both instances, the dominant group benefits from the inherent inadequacies of the doctrine, while the nondominant community suffers from such exploitation. Can progressive copyright theory reconcile this doctrinal dichotomy in order to effectuate the ultimate goal of equality and distributive?

If we consider the goals inherent in the originality requirement, one of these goals is based off the premise that we must prevent the inclusion of “ideas” in the protection of copyrightable works.[[306]](#footnote-306) The key question to be answered, therefore, is how does idea exclusion advance necessary human flourishing and community? If one entity owns an idea, and therefore the right to exclude others from developing said idea, that would lead to an “artificial depletion of this human resource.”[[307]](#footnote-307) From the perspective of progressive copyright theory, the importance lies in the extent to which human capabilities can be developed normatively from creation to protection. Originality must recognize the importance of access to knowledge, while simultaneously considering the ability to participate in the creative processes as well the ability to freely express themselves.

As articulated by Betsy Rosenblatt, copyright hierarchizes creators and creative practices based on their characterization as a creative “mastermind.”[[308]](#footnote-308) At the highest level is the “original” speaker (i.e. the individual author or creator) whose expressions are considered original, hence eligible for protection.[[309]](#footnote-309) Below them is the speaker that is considered “derivative” because their expressions derive from the “original speaker.”[[310]](#footnote-310) At the lowermost level is the “audience” who passively receives the expression.[[311]](#footnote-311) This hierarchal structure demonstrates that works that use, or even depend on preexisting material are categorically devalued and are susceptible to cultural biases. This artificial hierarchy, according to Rosenblatt, creates this imbalance dynamic where the owner of the copyright has control over meaning making.[[312]](#footnote-312) As a result, copyright law can serve as a form of cultural and political restraint.[[313]](#footnote-313)

In order to create a more equitable originality doctrine, recognition of the distinct values of creativity of each community is necessary. This nuanced understanding of creative output cannot be reduced to one formulaic distinction. Instead, consideration of the relationship between creativity, human flourishing, and communal development may reveal that the degree of protection varies depending on the form of artistic production. An understanding of creativity, and thus “original” output, must consider the way in which creative output can be commonly used.[[314]](#footnote-314) For example, both African American and indigenous creative output derives from communal cultural resources. The way in which these cultural productions have been created are fundamental to the community’s self-expression and the development fundamental parts of their cultures.[[315]](#footnote-315) Thus, to accommodate the diversity of community’s versions of creativity, a progress copyright approach, cannot impose a unitary meaning to creative expression.

1. *Authorship*

Copyright subsists only in original works of authorship. The bundle of rights associated with copyright depends on the definition of authorship. Copyright’s conception of “authorship” derives from romantic versions of the author. The romantic author is one of the most fundamental fallacies in modern copyright law. A construct that emerged from 18th century, cultural, political, economic, and social forces, the emphasis on the “romantic author” has dominated Western copyright law discourse. The Western view of the author is one who is an independent master, a genius, and a creative rebel. Copyright doctrine has determined ownership entitlements based on this stereotypical social construction of the author. As noted by David Saunders “it was always to be the role of copyright law to support the authorial personality required and enshrined by Romanticism.”[[316]](#footnote-316)

However, this social construction has not gone unchallenged. Philosophers, like Michel Foucault, have recognized that the conception of the author that underlie our Western legal systems is a reflection of society’s determination of who should receive certain entitlements.[[317]](#footnote-317) Foucault in *What is an Author*, described how an author’s name can “performs a certain role with regard to narrative discourse, assuring a classificatory function.”[[318]](#footnote-318) From this Foucauldian perspective, the name, as well as the individual, is put at a significant advantage. Legal scholars have also challenged the assumptions of authorship that underlie copyright entitlements. Authorship fails to take into consideration that originality can derive from group or collective production.[[319]](#footnote-319) Legal scholars have also acknowledged that the romanticized author contributes to the inequitable protection of minority cultural output.[[320]](#footnote-320) For example, the idea of the romantic author is particularly inapplicable to indigenous communities, which have different ideas of ownership, rights, and values.[[321]](#footnote-321)

If we understand copyright as a legal regime that structures social relations with social obligations, then we can truly answer the Foucauldian question of “who is the author?” An author is one that relies not on their singular “genius” or “mastery” but rather on various social structures that enable them to create their works. An author’s work is not merely a byproduct of individual talent or mastery, but rather a confluence of external factors that derive from social, political, and cultural values that influence the work of the author. The interconnectedness between the author and these values forms part of the larger social structure that is subconsciously collaborative and communal.

1. Fixation

For a work to be considered copyrightable, it must be “fixed in any tangible medium of expression, now known or later developed.”[[322]](#footnote-322) A work is “fixed” when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”[[323]](#footnote-323) The requisite tangibility ostensibly favors certain creations above others. As noted by Professor Rosenblatt the fixation requirement establishes “an artificial hierarchy by elevating works deemed fixed expressions over those deemed unfixed or ‘mere’ ideas.”[[324]](#footnote-324) This requirement is based on the premise that any non-fixed expression should merely be perceived as an idea. As a result, any work that is conveyed or communicated verbally is not acknowledged as a “work” that is considered deserving of protection.[[325]](#footnote-325) If the law assumes that only concrete manifestations can be replicated, then it devalues any work that may be dynamic or ephemeral. The proven consequence of this devaluation is that many types of intangible creations are outside the purview of copyright law. This exclusion of works allows for their inevitable exploitation.

Fixation does not sufficiently appreciate the potential dynamic and fluid nature embodied by many cultural and artistic expressions. An inclusive and more flexible approach to this doctrine must accommodate forms of ephemeral artistic expressions. Regardless of the tangibility of the work, it still has the capability to embody racial, sexual, ethnic, and political qualities that are essential to not only the creator’s identity, but the community as well. For indigenous communities in particular, preservation of these works is significant in the continual transmission of culture, history, and identity. A progressive approach reconsiders the idea of a “fixed” work in favor of a more dynamic approach that considers the social values of tangibility.

**CONCLUSION**

Copyright must uphold and protect fundamental human values. The conventional justification of copyright, based on economic incentives, has been inadequate to address these wider goals of “progress.” The constitutional goal of achieving progress must be for everyone, regardless of race, gender, or social status. Copyright does not only advance the production of more goods, but also influences our human capabilities and the capacity to lead a fulfilling life. While copyright has continued to bolster cultural and racial hierarchies and power structures, it has the capacity to have a significant influence on society, culture, and individual human capabilities. Progressive property theory sought to challenge the prevailing law and economics framework enriched in modern property theory. Through the incorporation of progressive property principles into copyright law, we can similarly foster a broader and more inclusive perception of copyright.

1. In the historic case of *State v. Shack,* the New Jersey Supreme Court stated that “property rights serve human values.” This case, as will be referenced *infra*, served as a catalyst for discourse on property rights and issues of social relations. State v. Shack, 277 A.2d 369, 372 (N.J. 1971). [↑](#footnote-ref-1)
2. The “Copyright Clause” of the United States 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.” U.S. Const. Art. I, §8, Cl. 8. [↑](#footnote-ref-2)
3. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031, 1075 (2005)(“Intellectual property protection in the United States has always been about generating incentives to create.”); William Fisher, *Theories of Intellectual Property*, in New Essays In The Legal And Political Theory Of Property, 168-169 (Stephen R. Munzer ed., 2001). [↑](#footnote-ref-3)
4. “‘Utilitarianism’ is not a single theory, but rather a cluster of theories that center around the following three components:

   the consequent component -- the rightness of actions is determined by the consequences;

   the value component -- the goodness or badness of consequences is to be evaluated by means of some standard of intrinsic value;

   iii. the range component -- it is the consequences of an act (or class of actions) as affecting everyone, and not just the agent himself, that are to be considered in determining rightness.”

   Adam Moore, *Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments*, 26 Hamline L. Rev. 601, 608 (2011). [↑](#footnote-ref-4)
5. Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”) [↑](#footnote-ref-5)
6. Madhavi Sunder, *IP3* , Stanford L. Rev. (2006) (“It is increasingly evident that utilitarianism fails as a comprehensive theory of intellectual property, either descriptively or prescriptively.”) [hereinafter “IP3”]. [↑](#footnote-ref-6)
7. *See e.g.,* *Id*.; Margaret Chon, *Intellectual Property and the Development Divide*, 27 Cardozo L. Rev. 2821, 2900-09 (2006), William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1744-93 (1988), Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property,* 52 Depaul L. Rev. 1171, 1173 (2003); Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287 (1988). [↑](#footnote-ref-7)
8. Madhavi Sunder, From Goods To A Good Life: Intellectual Property And Global Justice 3 (2012)[hereinafter “From Goods to a Good Life”]. [↑](#footnote-ref-8)
9. Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue.,* 69 Tex. L. Rev. 1853, 1860 (1990) [hereinafter “Objects of Property”]. [↑](#footnote-ref-9)
10. *See* Lea Shaver, *Copyright and Inequality*, 92 Wash. U. L. Rev. 117 (2014), [↑](#footnote-ref-10)
11. Anjali Vats and Dierdre Keller, *Critical Race IP,* 36 Cardozo Art & Ent. L. J. 735, 740 (2018). Critical Race IP is defined “as an interdisciplinary movement of scholars connected by their focus on the racial and colonial non-neutrality of the laws of copyright, patent, trademark, right of publicity, trade secret, and unfair competition using principles informed by CRT.”) [↑](#footnote-ref-11)
12. *See generally*, Betsy Rosenblatt, *Copyright’s One-Way Racial Appropriation Ratchet*, 53 UC David L. Rev. 591 (2019)[hereinafter “Copyright’s Appropriation Ratchet”]. [↑](#footnote-ref-12)
13. Rosemary J. Coombe, The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law (1998). [hereinafter “Cultural Life”]. [↑](#footnote-ref-13)
14. Margaret Chon, *supra* note 7. [↑](#footnote-ref-14)
15. K.J. Greene, *“Copynorms,” Black Cultural Production, and the Debate Over African-American Reparations*, 25 Cardozo Arts & Ent. L.J. 1179 (2008) [hereinafter “Copynorms”]. [↑](#footnote-ref-15)
16. Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 Cal. L. Rev. 1331 (2004). [↑](#footnote-ref-16)
17. Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 Rutgers L.J. 277 (2006). [↑](#footnote-ref-17)
18. Vats and Keller, *supra* note 11 at 740. [↑](#footnote-ref-18)
19. *Id*. at 752; *See e.g.,* Barbara Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982) (“The premise underlying the personhood perspective is that to achieve proper self-development- to be a person- an individual needs some external control over resources in the external environment. The necessary assurances take the form of property rights.”) [↑](#footnote-ref-19)
20. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745, 750 (2009) (“In recent years, law-and-economics analysis has dominated property scholarship. One goal of this Article is to offer an alternative to that mode of analyzing property disputes. Although law-and-economics theory certainly provides important insights into a remarkably wide range of property issues, its vision is limited and at times flawed. Perhaps the greatest flaw in law- and-economics theory is the poverty of its analysis of moral values and moral issues.”) [hereinafter “Social-Obligation Norm”]. [↑](#footnote-ref-20)
21. See *infra* Section III. [↑](#footnote-ref-21)
22. Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property,* 94 Cornell L. Rev. 743 (2009) [hereinafter “A Statement of Progressive Property”]. [↑](#footnote-ref-22)
23. *Id*. [↑](#footnote-ref-23)
24. Sunder, IP3, *supra* note 6. [↑](#footnote-ref-24)
25. U.S. Const. Art. 1, §8, cl. 8; *see* Jeanne Fromer, *The Intellectual Property’s Clause External Limitations*, 61 Duke L.J. 1329 (2012)(analyzing the IP’s clause structure, text, history, case law and policy in order to argue that the IP Clause may be both a grant of limited power, as well as a limitation of Congress’ power to promote the progress of science and useful arts). [↑](#footnote-ref-25)
26. U.S. Const. Art. 1, §8, cl. 8. [↑](#footnote-ref-26)
27. Shyamkrishna Balganesh and Taisu Zhang, *Legal Internalism In Modern Histories Of Copyright, Authors And Apparatus: A Media History Of Copyright,* 134 Harv. L. Rev. 1066, 1067 (2021)(examining three recent interdisciplinary histories of copyright law that emphasize legal internalism). [↑](#footnote-ref-27)
28. William M. Landes & Richard A. Posner, The Economic Structure Of Intellectual Property Law 4 (2003) (“Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.”); *See also* F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 Rutgers Computer & Tech. L.J. 293, 301 (2001) (“The predominant theory today in the United States is that copyright serves as an incentive to increase creative production.”)(citation omitted); Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 San Diego L. Rev. 61, 77 (1998) (“The conventional view is that copyright served as [a] necessary 99 incentive for authors to produce creative works…”) [↑](#footnote-ref-28)
29. Sarah K. Stadler, *Incentive and Expectation in Copyright*, 58 Hastings L.J. 433, 433 (2007)(examining the role that incentives must play for creators and their entitlements under copyright law). [↑](#footnote-ref-29)
30. Kevin J. Hickey, *Copyright Paternalism*, 19 Vand. J. Ent. & Tech. L. 415, 420 (2020). [↑](#footnote-ref-30)
31. *See generally* Eric E. Johnson, *The Macroeconomics Of Intellectual Property*, 100 Wash. U. L. Rev. 1139 (2023)(advocating for the use of macroeconomics in copyright incentive theory); Shani Shisha, *The Copyright Wasteland*, 47 B.Y.U.L. Rev. 1721, 1772 (2022)(“[C]opyright protection comes at a price: it affords copyright owners some measure of market exclusivity, thereby allowing them to charge higher prices and limit access to their works.”); Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 Harv. L. Rev. 1149, 1237 (1998)(“[G]enerally, it is argued, from the perspective of allocative efficiency it is preferable that all the exchangeable value of an authorial work be the property of him who produces it, rather than a free good that anyone can appropriate at will. The market will then ensure that all the resources needed to produce such works . . . [and] the owners of the copyrights will sell them to the highest bidder, whose bid will reflect the satisfaction thereby obtained.”) [↑](#footnote-ref-31)
32. Matthew Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 Tul. L. Rev. 187, 192 (2006) [↑](#footnote-ref-32)
33. Hickey, *supra* note 30 at 421. [↑](#footnote-ref-33)
34. *Id*. at 422 [↑](#footnote-ref-34)
35. *Id*.; *see also* Landes and Posner, *supra* note 27 at 40 (“In the absence of copyright protection the market price of a book or other expressive work will eventually be bid down to the marginal cost of copying, with the result that the work may not be produced in the first place…”); Jeanne Fromer, *supra* note 2 at 1751(“Without incentive, the theory goes, authors might not invest the time, energy, and money necessary to create these works because they might be copied cheaply and easily by free riders, eliminating authors' ability to profit from their works.”); *but see* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031, 1044 (2005) (“The focus on free riding leads to an assumption on the part of courts that all enrichment derived from use of an intellectual property right is necessarily unjust.”) [↑](#footnote-ref-35)
36. Landes and Posner, *supra* note 27 at \_\_\_\_; See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stan. L. Rev. 1343, 1436 (1989)(outlining the predominant view of the incentive theory that “[i]f free-riding and other forms of depredation will not so easily occur, then property is less necessary to secure adequate incentives.”); *but see* Eric E. Johnson, *Intellectual Property And The Incentive Fallacy,* 39 Fla. St. U. L. Rev. 623, 671 (2012)(“We should no longer tolerate easy assertions that intellectual goods need external incentives…this great fallacy causes them to draw erroneous conclusions and to champion ill-considered changes in the law.”) [↑](#footnote-ref-36)
37. Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond The Utilitarian*, 40 Fla. St. U.L. Rev. 441, 454 (2013)[hereinafter “Negative Spaces”]. [↑](#footnote-ref-37)
38. Wendy J. Gordon & Robert G. Bone, *Copyright*, in II Encyclopedia Of Law And Economics 189 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). [↑](#footnote-ref-38)
39. Shyamkrishna Balganesh, *The Immanent Rationality Of Copyright Law*, 115 Mich. L. Rev. 1047, 1050; But see Julie E. Cohen, *Creativity, Catalogs: Creativity and Culture in Copyright Theory*, 40 U.C. Davis L. Rev. 1151, 1159 (2007) [hereinafter “Creative and Culture”] (“[T]he tendency to conflate consequentialism with utilitarianism ignores versions of consequentialism that use rules other than utility maximization to decide on good outcomes. Rule consequentialism enables formulation of instrumental goals without imposing the artificial constraint that the resulting improvements in human well-being be amenable to expression in terms of utility, and therefore perfectly or even approximately commensurable…”) [↑](#footnote-ref-39)
40. Hickey, *supra* note 30 at 422; Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1571-73 (2009) (“Copyright law's principal justification today is the economic theory of creator incentives … [wherein] creators are presumed to be rational utility maximizers …”); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?,* 12 Theoretical Inquiries L. 29, 30 (2011) (“The standard American story about why we have copyright is that it provides the economic incentive that is essential to the creation of new works.”). [↑](#footnote-ref-40)
41. Anne Barron, *Copyright Infringement, ‘Free-Riding’ and the Lifeworld* in Copyright and Piracy: An Interdisciplinary Critique (Cambridge 2010). [↑](#footnote-ref-41)
42. Sunder, *From Goods to a Good Life*, *supra* note 8, at 25. [↑](#footnote-ref-42)
43. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the 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.”); Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (“Copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge… . The profit motive is the engine that ensures the progress of science.”) (citations omitted); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (“[B]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.”) [↑](#footnote-ref-43)
44. Mazer v. Stein, 347 U.S. 201, 219 (1954). [↑](#footnote-ref-44)
45. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985). [↑](#footnote-ref-45)
46. Fromer, *supra* note 2 at 1750. [↑](#footnote-ref-46)
47. Hickey, *supra* note 30 at 424. [↑](#footnote-ref-47)
48. Zimmerman, *supra* note 40 at 38-40. For example, she finds the “starving artist” narrative difficult to reconcile with this theory: “If we start with the assumption that people are rational profit maximizers, then it is difficult to make sense of the degree of risk creators are willing to take of never reaping any profit at all from all their work.” *Id*. at 41. [↑](#footnote-ref-48)
49. *Id*. at 35. [↑](#footnote-ref-49)
50. Johnson, Incentive Fallacy*, supra* note 36 at 641. He further maintained “[t]rue to theory, and consistent with experimental results obtained in the social scientist's laboratory, legions of everyday nonprofessionals have rushed in to seize creative opportunities as they have opened up-even when there has been zero expectation of getting paid.” *Id*. at 648. [↑](#footnote-ref-50)
51. *Id*. at 675 [↑](#footnote-ref-51)
52. Hickey, *supra* note 30 at 423. [↑](#footnote-ref-52)
53. Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 Va. L. Rev. 1787, 1791, 1832 (2008) (questioning whether “social norms can provide incentives to create”). [↑](#footnote-ref-53)
54. Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 Vand. L. Rev. 1669, 1673 (2009) (“There is no uniform or fully predictable statistical relationship between laws that increase copyright term, subject matter, rights, or criminal penalties and the number of new works registered in general. Overall, the most one can expect is a 38 percent chance that a law increasing copyright protection will lead to an increase in the number of new registrations…”) [↑](#footnote-ref-54)
55. Glynn Lunney, Copyright's Excess: Money And Music In The Us Recording Industry 193 (2018). [↑](#footnote-ref-55)
56. Stephanie Plamondon, *Impoverished IP,* 81 Ohio St. L. J. 523, 558 (2020). [↑](#footnote-ref-56)
57. *Id*. at 536 (“[T]here are many incompatibilities between IP participation and poverty, some of which easily spring to mind. Inadequate education, reduced opportunities for professional employment that provides an outlet for creative talent, and a scarcity of time73 and money might all help explain why a poor person who otherwise has the aptitude and desire might not end up creating something that is both IP-protectable and likely to generate meaningful income.”). [↑](#footnote-ref-57)
58. Rebecca, Tushnet, *The Boundaries Of Copyright And Trademark/Consumer Protection Law: Economies Of Desire: Fair Use And Marketplace Assumptions*, 51 Wm. & Mary L. Rev. 513, 515 (2009). [↑](#footnote-ref-58)
59. *Id*. at 517-18. She further argues that a “significant factor in this failure of incentive is that, regardless of the strength of protection, it is the likelihood of success in the market-a highly unpredictable variable, and one that law can do little if anything to affect-that is key to whether new authors reap rewards from creating works.” [↑](#footnote-ref-59)
60. CITE PROPERTY LAW TEXTBOOKS [↑](#footnote-ref-60)
61. John Locke, Two Treatises Of Government 285-86 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). [↑](#footnote-ref-61)
62. See e.g., See, e.g., Robert P. Merges, Justifying Intellectual Property 36-38 (2011); Justin Hughes, *The Philosophy of Intellectual Property,* 287 Geo. L.J. 287, 296-314 (1988); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1540-49 (1993). [↑](#footnote-ref-62)
63. William Fisher, *Theories of Intellectual Property*, in New Essays in the Legal and Political Theory of Property 1-12 (2001); *see also* Christopher Yoo, *Rethinking Copyright And Personhood*, 2019 U. Ill. L. Rev. 1039 (2019). [↑](#footnote-ref-63)
64. William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1774-83 (1988). [↑](#footnote-ref-64)
65. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 341-64 (1996). [↑](#footnote-ref-65)
66. Cohen, Creativity and Culture *supra* note 39 at 1154. [↑](#footnote-ref-66)
67. *Id*. [↑](#footnote-ref-67)
68. Roberta Kwall, *Inspiration And Innovation: The Intrinsic Dimension Of The Artistic Soul*, 81 Notre Dame L. Rev. 1945, 1946 (2006). [↑](#footnote-ref-68)
69. Margaret Chon, *Intellectual Property and the Development Divide*, 27 Cardozo L. Rev. 2821, 2832 (2006); Molly Shaffer Van Houweling, *Distributive Values in Copyright,* 83 Tex. L. Rev. 1535, 1538 (2005); Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism,* 59 UCLA L. Rev. 970, 993 (2012). [↑](#footnote-ref-69)
70. Sunder, From Goods to a Good Life, *supra* note 8 at 25. [↑](#footnote-ref-70)
71. *Id*. at 31. [↑](#footnote-ref-71)
72. Sunder, From Goods to a Good Life, *supra* note 8 at 31. [↑](#footnote-ref-72)
73. *See e.g.,* Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development),* 40 U.C. Davis L. Rev. 717 (2007); Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright,* 29 Berkeley Tech. L.J. 229, 287 99 (2014); *Shubha Ghosh, The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets,* 40 U.C. Davis L. Rev. 855, 857 (2007) [↑](#footnote-ref-73)
74. Sunder, IP3, *supra* note 6 at 263. [↑](#footnote-ref-74)
75. K. J. Greene, *Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection*, 21 Hastings Comm. & Ent. L.J. 339, 349 n. 41 (1998) [hereinafter “Copyright, Culture, & Black Music”] [↑](#footnote-ref-75)
76. *Id*. at 355. [↑](#footnote-ref-76)
77. Richard Chen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L.J. 517, 526 (1991). It should be noted that the initial copyright law from the beginning failed to protect the interest of disadvantaged communities. Professor Richard Chen recalls that the Statute of Anne “protected the interests of booksellers by extending the exclusive rights to the assigns of authors as well. The booksellers knew that their position in the market was such that authors would, as a practical matter, be forced to sell their manuscripts to the Stationers' company if the wanted to get their work published at all.” *Id*. [↑](#footnote-ref-77)
78. Olufunmilayo B. Arewa, *From J.C. Bach To Hip Hop: Musical Borrowing, Copyright And Cultural Context,* 84 N.C.L. Rev. 547, 608 (2006) [hereinafter “Musical Borrowing”]. [↑](#footnote-ref-78)
79. K.J. Greene*, Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 Am. U. J. Gender Soc. Pol’y & L. 365, 371 (2008). [↑](#footnote-ref-79)
80. Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 Am. U. J. Gender Soc. Pol'y & L. 551, 551 (2006). [↑](#footnote-ref-80)
81. Green, Copyright, Culture, & Black Music, *supra* note 74 at 368. [↑](#footnote-ref-81)
82. *Id*. [↑](#footnote-ref-82)
83. *Id*. at 369. [↑](#footnote-ref-83)
84. *Id*. (“The persistence of notions of white superiority and ideology of separation resulted in the cultural devaluation of works by minority artists as a class.”) [↑](#footnote-ref-84)
85. *See e.g,* Anupam Chander & Madhavi Sunder, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice,* 40 U.C. Davis L. Rev. 563 (2007); Julie E. Cohen, Creativity and Culture, supra note \_\_\_\_\_; Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship,* 112 W. Va. L. Rev. 97 (2009); Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information,* 55 N.Y. L. Sch. Rev. 77 (2010/11); Brianna Dahlberg, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups,* 20 S. Cal. Rev. L. & Soc. Just. 275 (2011); *Lateef Mtima, What's Mine is Mine But What's Yours Is Ours: IP Imperialism, the Right of Publicity, and Intellectual Property Social Justice in the Digital Information Age*, 15 SMU Sci. & Tech. L. Rev. 323, 332-36 (2012); Lateef Mtima, *Copyright and Social Justice in the Digital Information Society: “Three Steps” Toward Intellectual Property Social Justice,* 53 Hous. L. Rev. 459 (2015); Peter S. Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 Brigham-Kanner Prop. Rts. Conf. J. 147 (2016). [↑](#footnote-ref-85)
86. Green, Copyright, Culture, & Black Music, *supra* note 74 at 369 (“Given the context of inferiority fostered by the ideology of separation, it is likely that society would not generally value a work by a minority artist as much as the same work by a white artist.) [↑](#footnote-ref-86)
87. *Id*. at 370. [↑](#footnote-ref-87)
88. *Id*. [↑](#footnote-ref-88)
89. *Id*. at 378 [↑](#footnote-ref-89)
90. *Id.* at 361. [↑](#footnote-ref-90)
91. *Id*. at 357 (“The amount of revenue lost due to creative appropriation and cultural devaluation cannot be quantified, but it is not unreasonable to presume it is a staggering sum.) *Id*. at n.86. [↑](#footnote-ref-91)
92. *Id*. at 358. [↑](#footnote-ref-92)
93. *Id*. [↑](#footnote-ref-93)
94. *Id*. [↑](#footnote-ref-94)
95. *Id*. [↑](#footnote-ref-95)
96. *Id*. [↑](#footnote-ref-96)
97. Plamondon, *supra* note 56 at 552. [↑](#footnote-ref-97)
98. Robert Brauneis & Dotan Oliar, *An Empirical Study of the Race, Ethnicity, Gender, and Age of Copyright Registrants,* 86 Geo. Wash. L. Rev. 46, 59-60 (2018). [↑](#footnote-ref-98)
99. *Id*. at 60-61. The survey produced staggering disparities for minority groups. For example, Latinos contributed only 45% of what would have been expected if their participation in the copyright system aligned proportionally to their representation in the overall population. Id. at 60. The corresponding percentages for Asian and Pacific Islanders was 83%, while American Indians and Alaska natives was 77% , and 62% for people of mixed races. *Id*. at 61. If we compare that to whites, who have produced copyrighted works at a rate of 116%, far surpassing the expected output based on their representation within the overall population. Id. [↑](#footnote-ref-99)
100. Brauneis & Oliar, *supra* note 97, at 73 (revealing that men represent two-thirds of copyright owners, even though they only constitute half of the population.) [↑](#footnote-ref-100)
101. Plamondon, *supra* note 56 at 554 [↑](#footnote-ref-101)
102. *Id*. [↑](#footnote-ref-102)
103. *Id*. at 555 [↑](#footnote-ref-103)
104. In the case, a farmer employed migrant works for his seasonal needs and housed them on the property. Attorney Tejeres sought out a migrant workers to remove sutures, while Attorney Shack sought to discuss a legal problem with another migrant worker. When they entered the property, the owner of the property called the police and they were subsequently arrested. The case went up to the New Jersey Supreme Court and in its landmark decision the court held in favor of the defendants. EDIT. [↑](#footnote-ref-104)
105. State v. Shack at 372 [↑](#footnote-ref-105)
106. Sunder, IP3 *supra* note 6 at 292. [↑](#footnote-ref-106)
107. Rashmi Dyal-Chand, *Pragmatism And Postcolonialism: Protecting Non-Owners In Property Law*, 63 Am. U.L. Rev. 1683, 1689 (2014). [↑](#footnote-ref-107)
108. Alexander et al., Progressive Property Statement, *supra* note 22. [↑](#footnote-ref-108)
109. Laura S. Underkuffler, *Essay In Honor Of Greg Alexander The Holy Grail Of Progressive Property*, 29 Cornell J. L. & Pol’y 717, 718 (2019). [↑](#footnote-ref-109)
110. *Id*. [↑](#footnote-ref-110)
111. Alexander et al., Progressive Property Statement, *supra* note 22 at 743. [↑](#footnote-ref-111)
112. *Id*. [↑](#footnote-ref-112)
113. *Id*. [↑](#footnote-ref-113)
114. *Id*. [↑](#footnote-ref-114)
115. *Id*. [↑](#footnote-ref-115)
116. *Id*. [↑](#footnote-ref-116)
117. *Id*. [↑](#footnote-ref-117)
118. *Id*; *See also* Underkuffler, *supra* note 106 at 719. [↑](#footnote-ref-118)
119. *Id*. [↑](#footnote-ref-119)
120. *Id*. [↑](#footnote-ref-120)
121. *Id*. [↑](#footnote-ref-121)
122. Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. Irvine L. Rev.

     251, 259 (2019)(applying progressive property theory to housing justice campaigns). [↑](#footnote-ref-122)
123. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 Calif. L. Rev. 107, 126 (2013). [↑](#footnote-ref-123)
124. Alexander, Social Obligation Norm, *supra* note 20 at 748. [↑](#footnote-ref-124)
125. *Id*. at 757. [↑](#footnote-ref-125)
126. *Id*. at 767. Alexander normatively describes “human flourishing” in two distinct ways. First, he stresses the idea that “a particular web of social relationships is a necessary condition for humans to develop the distinctively human capacities that allow us to flourish.” *Id*. at 761. The second characteristic he ascribes to human flourishing is the idea that it must include “the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about what is valuable within those available alternatives.” *Id*. at 762. [↑](#footnote-ref-126)
127. *Id*. at 766-767. The reason for this connection, according to Alexander, is because “[t]he communities in which we find ourselves play crucial roles in the formation of our preferences, the extent of our expectations, and the scope of our aspirations.” *Id*. [↑](#footnote-ref-127)
128. *Id*. [↑](#footnote-ref-128)
129. Id. at 768 [↑](#footnote-ref-129)
130. *Id*. [↑](#footnote-ref-130)
131. *Id*. [↑](#footnote-ref-131)
132. *Id*. at 772. [↑](#footnote-ref-132)
133. *Id*. at 774. [↑](#footnote-ref-133)
134. *Id*. at 775. [↑](#footnote-ref-134)
135. *Id*. at 776. [↑](#footnote-ref-135)
136. *Id*. [↑](#footnote-ref-136)
137. *Id*. at 779. [↑](#footnote-ref-137)
138. *Id*. at 808. [↑](#footnote-ref-138)
139. State v. Shack, 277 A.2d 369 (N.J. 1971). [↑](#footnote-ref-139)
140. Alexander, Social Obligation Norm, *supra* note 20 at 809. [↑](#footnote-ref-140)
141. To be clear, Peñalver’s scholarship focus on land-use. However, his application of virtue ethics is important to the overall progressive property theory scholarship. [↑](#footnote-ref-141)
142. Eduardo M. Peñalver, *Land Virtues*, 94 Cornell L. Rev. 821, 832-60 (2009). [↑](#footnote-ref-142)
143. *Id*. at 839. [↑](#footnote-ref-143)
144. *Id*. [↑](#footnote-ref-144)
145. *Id*. at 858. [↑](#footnote-ref-145)
146. *Id*. at 842-844. [↑](#footnote-ref-146)
147. *Id*. at 860. [↑](#footnote-ref-147)
148. *Id*. at 864. He uses for example the way in which human virtues impact decision making. For example, “a person who has the virtue of courage possesses a stable disposition to behave in certain characteristically brave ways in a broad range of situations where those lacking the virtue would flee.” [↑](#footnote-ref-148)
149. *Id*. at 868 [↑](#footnote-ref-149)
150. *Id*. at 870 [↑](#footnote-ref-150)
151. *Id*. at 887-888. [↑](#footnote-ref-151)
152. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 Cornell L. Rev. 1009, 1010 (2009)[hereinafter “Democratic Estates”] [↑](#footnote-ref-152)
153. *Id*. [↑](#footnote-ref-153)
154. *Id*. at 1047. [↑](#footnote-ref-154)
155. *Id*. [↑](#footnote-ref-155)
156. *Id*. [↑](#footnote-ref-156)
157. *Id*. at 1049. [↑](#footnote-ref-157)
158. *Id.* at 1050. [↑](#footnote-ref-158)
159. *Id*. at 1051. [↑](#footnote-ref-159)
160. *Id*. at 1054 [↑](#footnote-ref-160)
161. *Id*. [↑](#footnote-ref-161)
162. *Id*. at 1059. [↑](#footnote-ref-162)
163. *See e.g.,* Chelsea Kim, *An Examination of Graffiti Protection and the Social Obligation Theory of Property*, 36 Emory Int’l L. Rev. 539 (2022)(applying progressive property theory to graffiti protection through the Visual Arts Rights Act). [↑](#footnote-ref-163)
164. *See e.g.,* Christopher Odinet and Juliet Moringiello, *The Property Law of Tokens*, 74 Florida Law Review 607 (2022). [↑](#footnote-ref-164)
165. *See e.g*, Weiss *supra* note 119. [↑](#footnote-ref-165)
166. *See e.g.,* Jessica L. Roberts, *Progressive Genetic Ownership*, 93 Notre Dame L. Rev. 1105 (2018) [↑](#footnote-ref-166)
167. Rosser, *supra* note 120 at 113. [↑](#footnote-ref-167)
168. Timothy M. Mulvaney, *Progressive* *Property Moving Forward*, 5 Calif. L. Rev. Circuit 349, 355 (2014). [↑](#footnote-ref-168)
169. Rosser, *supra* note 120 at 129-30. [↑](#footnote-ref-169)
170. Mulvaney, *supra* note 164 at 358. [↑](#footnote-ref-170)
171. *Id* [↑](#footnote-ref-171)
172. *Id* at 361. [↑](#footnote-ref-172)
173. *Id*. at 362. [↑](#footnote-ref-173)
174. *Id*. [↑](#footnote-ref-174)
175. *Id*. at 368. [↑](#footnote-ref-175)
176. Roberts, *supra* note 162 at 1115. [↑](#footnote-ref-176)
177. *Id*. [↑](#footnote-ref-177)
178. *Id*. Although to be clear, this does not mean that individual rights like self-determination, privacy, and dignity are not considered. They are balanced within the consideration of a communal well-being. [↑](#footnote-ref-178)
179. *Id*. [↑](#footnote-ref-179)
180. David Opderbeck, *Beyond Bits, Memes And Utility Machines: A Theology Of Intellectual Property As Social Relations,* 10 University of St. Thomas L.J. 738, 738 (2013). [↑](#footnote-ref-180)
181. Carol M Rose, *Property in all the wrong places?* 114 Yale L. J. 991, 1019 (2005). [↑](#footnote-ref-181)
182. Menachem Mautner, *The Future Of Legal Theory: Essay And Comment: Three Approaches To Law And Culture,* 96 Cornell L. Rev. 839, 848-849 (2011). [↑](#footnote-ref-182)
183. T. Todorov, Mikhail Bakhtin: The Dialogical Principle ix (W. Godzich trans. 1984). [↑](#footnote-ref-183)
184. Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue,* 69 Tex. L. Rev. 1853, 1878 (1991) [hereinafter “Objects of Property”]. [↑](#footnote-ref-184)
185. *Id*. (“Put differently, the constitutive approach holds that law, by its participation in the constitution of culture, also participates in the creation of the mind categories through which individuals perceive the social relations in which they take part - i.e., their status vis-a-vis other individuals, what others are entitled to do to them, what they are entitled to do to others, and the self-perceived identities of individuals and groups.”) [↑](#footnote-ref-185)
186. *See e.g*., Sunder, IP3, *supra* note 6. [↑](#footnote-ref-186)
187. Nicole M. Murphy, *Cyberspace & The Law: Privacy, Property, And Crime In The Virtual Frontier: The Implications For Law Of User Innovation*, 94 Minn. L. Rev. 1417, 1463 (2010). [↑](#footnote-ref-187)
188. Sunder, IP3, *supra* note 6 at 315-16. [↑](#footnote-ref-188)
189. *Id*. [↑](#footnote-ref-189)
190. *Id*. at 313. [↑](#footnote-ref-190)
191. Coombe, supra note 180 at 1866. [↑](#footnote-ref-191)
192. Sunder, IP3, *supra* note 6 at 317. [↑](#footnote-ref-192)
193. *Id*. [↑](#footnote-ref-193)
194. *Id*. at 319 [↑](#footnote-ref-194)
195. *Id*. at 323. [↑](#footnote-ref-195)
196. See e.g., Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework,* 40 U.C. Davis L. Rev. 1039, 1075-78 (2007). [↑](#footnote-ref-196)
197. Peter Drahos, The Universality of Intellectual Property Rights: Origins and Development, Intellectual Property and Human Rights (1998), http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos. pdf. [↑](#footnote-ref-197)
198. Paul Torremans, Human Rights: Freedom of Expression, Intellectual Property, Privacy 338 (Paul L.C. Torremans ed., 2004). [↑](#footnote-ref-198)
199. J. Janewa Osei-Tutu, H*umanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus*, 20 Vand. J. Ent. & Tech. L. 207, 247 (2017). [↑](#footnote-ref-199)
200. U.S. Const. Art. 1 §8 Cl. 8. [↑](#footnote-ref-200)
201. Alexander, Social Obligation Norm, *supra* note 20 at 766-67. [↑](#footnote-ref-201)
202. Thomas C. Berg, *Intellectual Property and the Preferential Option for the Poor*, 5 J. Catholic Soc. Thought 193, 199 (2008). [↑](#footnote-ref-202)
203. *Id.* [↑](#footnote-ref-203)
204. Sunder, IP3, *supra* note 6 at 301. [↑](#footnote-ref-204)
205. *Id*. at 314 [↑](#footnote-ref-205)
206. *Id*. [↑](#footnote-ref-206)
207. Alexander, Social Obligation Norm, *supra* note 20 at 811. [↑](#footnote-ref-207)
208. Alexander, Social Obligation Norm, *supra* note 20 at 812. [↑](#footnote-ref-208)
209. *Id*. at 775. [↑](#footnote-ref-209)
210. *Id*. [↑](#footnote-ref-210)
211. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L. J. 283, 364 (1996). [↑](#footnote-ref-211)
212. 17 U.S.C. § 115 (2018). Under this section, when an owner of a musical composition agrees once to license her composition, she must then agree to license her composition to additional licensees at a government-set price. [↑](#footnote-ref-212)
213. See Jacob Noti-Victor, *Reconceptualizing Compulsory Copyright Licenses,* 72 Stan. L. Rev. 915, 935 (2020); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 Colum. L. Rev. 2655, 2661-62 (1994) (“[A] common rationale for the several statutory compulsory licenses in copyright law is that they are needed in order for certain types of exchange to take place. Transaction costs preclude the formation of a market for certain types of rights; in the absence of statutorily mandated transactions, none would take place.”) [↑](#footnote-ref-213)
214. Lateef Mtima, *supra* note 84 at 113. [↑](#footnote-ref-214)
215. Noti-Victor, *supra* note 211 at 937. [↑](#footnote-ref-215)
216. Alexander, Social Obligation Norm, *supra* note 20. [↑](#footnote-ref-216)
217. Lateef Mtima, *supra* note 84 at 116. [↑](#footnote-ref-217)
218. Noti-Victor, *supra* note 211 at 936. [↑](#footnote-ref-218)
219. However, it should be noted that the fair use doctrine has come under great scrutiny for the narrowed scope of the fair use doctrine and it’s ability to protect values under the first amendment. See David L. Lange and H. Jefferson Powell, No Law: Intellectual Property in the Image of an Absolute First Amendment 97 (2009) (“[T]he fair use doctrine today is altogether inadequate”); Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism,* 91 Calif. L. Rev. 323, 329 (2003) (calling it the “shrinking doctrine of fair use”); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives - Access Paradigm*, 49 Vand. L. Rev. 483, 546 (1996) (“As Congress and various courts have expanded the scope of the author's protected interest, so too have they narrowed the scope of the fair use doctrine.”). [↑](#footnote-ref-219)
220. 17 U.S.C. 107 [↑](#footnote-ref-220)
221. Michael Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525, 1624 (2004). [↑](#footnote-ref-221)
222. Alexander, Social Obligation Norm, *supra* note 20 at 810; *See also*, Landes and Posner, *supra* note 27. [↑](#footnote-ref-222)
223. See Madison, supra note 217; H. Brian Holland, *Social Semiotics In The Fair Use Analysis*, 24 Harv. J. Law & Tec 335, 360 (2011); Haochen Sun, Fair Use As A Collective User Right, 90 N.C.L. Rev. 125 (2011). [↑](#footnote-ref-223)
224. Alexander, Social Obligation Norm, *supra* note 20 at 811. [↑](#footnote-ref-224)
225. *Id*. [↑](#footnote-ref-225)
226. *Id*. [↑](#footnote-ref-226)
227. Roberts, *supra* note 162 at 1159. [↑](#footnote-ref-227)
228. Sonia K. Katyal, *Performance, Property, And The Slashing Of Gender In Fan Fiction,* 14 Am. U.J. Gender Soc. Pol'y & L. 461, 462 (2006). [↑](#footnote-ref-228)
229. Sunder, From Goods to a Good Life, *supra* note 8 at 31. [↑](#footnote-ref-229)
230. Sunder, IP3, *supra* note 6 at 315. [↑](#footnote-ref-230)
231. *Id*. at 324-325. [↑](#footnote-ref-231)
232. Betsy Rosenblatt, *Belonging as Intellectual Creation*, 82 Mo. L. Rev. 91, 93 (2017). [↑](#footnote-ref-232)
233. Indeed, Sunder even argued that “[i]n intellectual property scholarship, ‘culture’ is a word on everybody’s lips.” Sunder, IP3, *supra* note 6 at 321. [↑](#footnote-ref-233)
234. Sunder, From Goods to a Good Life, *supra* note 8 at 66. [↑](#footnote-ref-234)
235. *Id*. at 45. [↑](#footnote-ref-235)
236. *Id*. [↑](#footnote-ref-236)
237. Coombe, *supra* note 180 at 1880. [↑](#footnote-ref-237)
238. *Id*. [↑](#footnote-ref-238)
239. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression For the Information Society,* 79 N.Y.U L. Rev. 1 (2004). Balkin defines “democratic culture” as a system in which “everyone – not just political, economic, or cultural elites – has a fair chance to participate in the production of culture, and in the development of ideas and meanings that constitute them and the communities and subcommunities to which they belong.” *Id*. at 3-4. [↑](#footnote-ref-239)
240. Netanel, supra note 207 at 347. [↑](#footnote-ref-240)
241. He defines this as “the activity of creating and communication such expression and the expression itself constitutes vital components of a democratic civil society.” *Id*. [↑](#footnote-ref-241)
242. *Id*. at 347 [↑](#footnote-ref-242)
243. *Id*. at 351; *See also* Jack M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 Yale L. J. 1935, 1948 (1995)(contending that popular culture is “not a sideshow or distraction from democratic culture, but the main event). [↑](#footnote-ref-243)
244. Netanel, *supra* note 207 at 351. [↑](#footnote-ref-244)
245. *Id*. at 352. [↑](#footnote-ref-245)
246. *Id*. [↑](#footnote-ref-246)
247. Sunder, From Goods to a Good Life, *supra* note 8 at 66. [↑](#footnote-ref-247)
248. *Id*. at 38. [↑](#footnote-ref-248)
249. *Id*. [↑](#footnote-ref-249)
250. Madhavi Sunder, *Cultural Dissent*, 54 Stanford L. Rev. 495, 498 (2001) [hereinafter “Cultural Dissent”] (“Cultures now more than ever are characterized by cultural dissent: challenges by individuals within a community to modernize, to broaden, the traditional terms of cultural membership. Today, more and more individuals are claiming a right to dissent from traditional cultural norms and to make new cultural meanings – that is, to reinterpret cultural norms in ways more favorable to them.” [↑](#footnote-ref-250)
251. Sunder, From Goods to a Good Life, *supra* note 8 at 48. [↑](#footnote-ref-251)
252. Netanel, *supra* note 207 at 341 (“Copyright plays a central role in promoting public education and expressive diversity.” [↑](#footnote-ref-252)
253. IP3 at 268 [↑](#footnote-ref-253)
254. Sunder, From Goods to a Good Life, *supra* note 8 at 90. [↑](#footnote-ref-254)
255. Netanel, *supra* note 207 at 352. [↑](#footnote-ref-255)
256. Janewa Osei Tutu, *Value Divergence in Global Intellectual Property Law,* 87 Indiana L. J. 1639, 1681 (2012) [hereinafter “Value Divergence”] (“The value of the copyright may be that the author is acknowledged for her work and that the integrity of the work is protected, rather than any market value that may attach to the work.”) [↑](#footnote-ref-256)
257. Green, Copynorms, *supra* note 15; Sunder, From Goods to a Good Life, *supra* note 8 at 39. [↑](#footnote-ref-257)
258. Sunder, From Goods to a Good Life, *supra* note 8 at 66. [↑](#footnote-ref-258)
259. Netanel, *supra* note 207 at 364 [↑](#footnote-ref-259)
260. Sunder, From Goods to a Good Life, *supra* note 8 at 57; *see also* J. Janewa Osei Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 Marq. Intell. Prop. L. Rev. 147 (2011). [↑](#footnote-ref-260)
261. *See* Margaret Jane Radin, *Property and Personhood* 34 Stan. L. Rev. 957 (1982)(“Property is damnation as well as salvation, object-fetishism as well as moral groundwork.”) [↑](#footnote-ref-261)
262. Sunder, From Goods to a Good Life, *supra* note 8 at 112. FIND REPORT [↑](#footnote-ref-262)
263. *Id*. at 65. [↑](#footnote-ref-263)
264. *Id*. [↑](#footnote-ref-264)
265. *Id*. at 91. Engage more with this case & cite original case [↑](#footnote-ref-265)
266. Fair Culture is defined as “the realization of cultural rights and the inclusion of everyone in cultural signification, irrespective of their age, gender, ability, or ethnic, religious, or cultural background.” *Id*. at 89. [↑](#footnote-ref-266)
267. *Id*. at 94. [↑](#footnote-ref-267)
268. ADD BETSY ROSENBLATT’S BELONGING AS INTELLECTUAL CREATION [↑](#footnote-ref-268)
269. Dianne Leenheer Zimmerman, *Can Our Culture Be Saved? The Future of Digital Archiving*, 91 Minn. L. Rev. 989, 989 (2007) [↑](#footnote-ref-269)
270. *See* Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 Berkeley Tech. L.J. 1175, 1233 (2011) (“The public has a strong interest in the preservation of the cultural record. Libraries, archives, and museums have the institutional mission to perform this critical function. The public shares a similarly strong interest in access to works, information, and artifacts preserved by these institutions.”) [↑](#footnote-ref-270)
271. R. Anthony Reese, *What Copyright Owes the Future*, 50 Houston L. Rev. 287, 297 (2012) (“You may wonder, ‘How does promoting the creation and circulation of copies promote preservation?’ It turns out that distributing a work in multiple copies to a variety of owners can be one of the best mechanisms to help ensure that the work will survive into the future.”) [↑](#footnote-ref-271)
272. Jessica D. Litman, *Lawful Personal Use*, 85 Tex. L. Rev. 1871, 1880 (2007). [↑](#footnote-ref-272)
273. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. Rev. 577, 608 (2003). [↑](#footnote-ref-273)
274. R. Anthony Reese, What Copyright Owes the Future, supra note 265 at 288. [↑](#footnote-ref-274)
275. *See* Osei Tutu, Value Divergence, supra note 251 at 1684 (“Indeed, these are state-granted private rights that are granted in exchange for some public benefit.”). [↑](#footnote-ref-275)
276. 17 U.S.C. § 407. [↑](#footnote-ref-276)
277. Pamela Samuelson et al., *supra* note 264 at 1187. [↑](#footnote-ref-277)
278. See 17 U.S.C. § 108(b) (2006) (permitting the reproduction and and distribution of unpublished work for libraries for the purposes of, among other things, “preservation and security”); 17 U.S.C. § 108(c) (2006) (permitting reproduction of published works for the purpose “of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen”). [↑](#footnote-ref-278)
279. Laura N. Gasaway, *Amending the Copyright Act for Libraries and Society: The Section 108 Study Group*, 70 Alb. L. Rev. 1331, 1331 (2007). [↑](#footnote-ref-279)
280. David Fagundes, *Property Rhetoric and the Public Domain*, 94 Minn. L. Rev. 652, 686 (2010). [↑](#footnote-ref-280)
281. Douglas Lichtam, *Copyright as a Rule of Evidence*, 52 Duke L. J., 683, 723 (2003); but see Emily Behzadi Cárdenas, *Desettling Fixation*, N.C. L. Rev. (forthcoming 2024). [↑](#footnote-ref-281)
282. See generally Martha C. Nussbaum, Women and Human Development: The Capabilities Approach (2000); Martha C. Nussbaum, Capabilities as Fundamental Entitlements: Sen and Social Justice, 9 Feminist Econ. 33 (2003). [↑](#footnote-ref-282)
283. Betsy, Rosenblatt *Intellectual Property's Negative Space: Beyond The Utilitarian*, 40 Fla. St. U.L. Rev. 441, 457 (2013) [hereinafter “Negative Spaces”] [↑](#footnote-ref-283)
284. Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education,* 40 U.C. Davis L. Rev. 803, 805-08 (2007); Shlomit Yanisky-Ravid, *The Hidden Though Flourishing Justification of Intellectual Property Laws: Distributive Justice, National Versus International Approaches*, 21 Lewis & Clark L. Rev. 1, 6 (2017) [↑](#footnote-ref-284)
285. Justin Hughes and Robert P. Merges, *Copyright and Distributive Justice*, 92 Notre Dame L. Rev. 513, 541 (2017)(“the incentive structure made possible (or made more easily possible) by copyright induces the creation and distribution of works that improve the position of all levels of the society.”) [↑](#footnote-ref-285)
286. Id. at 533-36; *But see* Green, Copyright, Culture, & Black Music, *supra* note 74 at 370-72 (racial minority artists are taken advantage of in contractual negotiations). [↑](#footnote-ref-286)
287. Glynn S. Lunney, Jr., *Copyright and the 1%,* 23 Stan. Tech. L. Rev. 1, 22 (2020). [↑](#footnote-ref-287)
288. Rosenblatt, Negative Spaces, *supra* note 276 at 473. [↑](#footnote-ref-288)
289. *Id*. at 485. [↑](#footnote-ref-289)
290. John Rawls established the framework for distributive justice in this seminar work “A Theory of Justice.” John Rawls, A Theory of Justice 302 (1971). For works that consider distributive justice and copyright, *see generally* Hughes and Merges, *supra* note 278; Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 Tex. L. Rev. 1535 (2005). [↑](#footnote-ref-290)
291. Lateef Mtima, *The Idea Exclusions in Intellectual Property Law,* 28 Tex. Intell. Prop. L.J. 343, 379 (2020); Yanisky-Ravid, *supra* note at 277 at 5. [↑](#footnote-ref-291)
292. Roberts, supra note 162 at 11161. [↑](#footnote-ref-292)
293. *See generally,* Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 Tex. L. Rev. 859 (2016) (examining the colonial dynamics and normative arguments of cultural appropriation); Michael F. Brown, Who Owns Native Culture? (2003) (providing case studies of cultural appropriation); Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 Int’l J. Cultural Prop. 40 (2005) (examining how information society has contributed to cultural appropriation); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 Ariz. St. L.J. 299 (2002) (examining the history of appropriation and the “right to culture” of indigenous groups) ; Rosemary J. Coombe*, The Properties of Culture, and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 Can. J.L. & Juris. 249 (1993) (exploring the controversy of cultural appropriation within the wider lens of colonial discourses). [↑](#footnote-ref-293)
294. 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”). [↑](#footnote-ref-294)
295. Rosenblatt, Appropriation Ratchet, *supra* note \_\_\_\_, at 598. [↑](#footnote-ref-295)
296. 17 U.S.C. § 102(a). [↑](#footnote-ref-296)
297. 499 U.S. 340,345 (1991). [↑](#footnote-ref-297)
298. *Id*. [↑](#footnote-ref-298)
299. Christopher Buccafusco, *There's No Such Thing As Independent Creation, And It's A Good Thing, Too,* 64 Wm. & Mary L. Rev. 1617, 1620 (2023)(discussing the differences between the originality standard between plaintiffs and defendants in infringement actions). [↑](#footnote-ref-299)
300. Arewa, *supra* note \_\_\_\_\_ at 568 (*citing* Martin Scherzinger, Music, Spirit Possession and the Copyright Law: Cross-Cultural Comparisons and Strategic Speculations, 31 Y.B. Traditional Music 102, 105 (1999)). [↑](#footnote-ref-300)
301. Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities,* 18 Cardozo Arts & Ent. L.J. 175, 188 (2000); *see also* Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?* 30 Conn. L. Rev. 1, 19 (1997)(examining the originality requirement as a barrier to protection of folklore). [↑](#footnote-ref-301)
302. Farley, *supra* note 292 at 21. [↑](#footnote-ref-302)
303. K.G. Green, Copynorms, *supra* note 15 at 1200. In this article, Green provides an example of African-American composers and performs who have been historically at the forefront of musical creation and innovation. [↑](#footnote-ref-303)
304. *Id*. [↑](#footnote-ref-304)
305. *See* Doris Estelle Long, *Traditional Knowledge and the Fight for the Public Domain*, 5 J. Marshall Rev. Intell. Prop. L. 317 (2006). [↑](#footnote-ref-305)
306. Roberta Kwall has written that the Framers were concerned with preventing a monopolistic control of over intellectual works in perpetuity. Roberta Kwall, *Inspiration And Innovation: The Intrinsic Dimension Of The Artistic Soul,* 81 Notre Dame L. Rev. 1945, 1986 [↑](#footnote-ref-306)
307. Mitma, Idea Exclusions, *supra* note 287 at 345. [↑](#footnote-ref-307)
308. Rosenblatt, *Appropriation Ratchet*, *supra* note \_\_\_, at 602. [↑](#footnote-ref-308)
309. *Id*. [↑](#footnote-ref-309)
310. *Id*. [↑](#footnote-ref-310)
311. *Id*. [↑](#footnote-ref-311)
312. *Id*. at 604. [↑](#footnote-ref-312)
313. See e.g., Coombe, *supra* note \_\_\_\_\_\_ at 1866 (stating that “freezing the connotations of signs and symbols and fencing off fields of cultural meaning with 'no trespassing' signs - intellectual property laws may enable certain forms of political practice and constrain others”) [↑](#footnote-ref-313)
314. Arewa “Freedom of Copy” at 528. [↑](#footnote-ref-314)
315. See Id.; Riley, supra note 297. [↑](#footnote-ref-315)
316. David Saunders, Authorship and Copyright 216-17 (1992). [↑](#footnote-ref-316)
317. Michel Foucault, What is an Author? in TEXTUAL STRATEGIES: Perspectives IN POST-STRUCTURALIST CRITICISM 159 (J. Harari ed., 1979). [↑](#footnote-ref-317)
318. *Id*. at 147. [↑](#footnote-ref-318)
319. See Riley at 184; Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of “Authorship,” Duke L.J. 455 (1991). [↑](#footnote-ref-319)
320. See e.g, find cites to Green, Riley, Arewa. [↑](#footnote-ref-320)
321. Id. at 185. [↑](#footnote-ref-321)
322. 17 U.S.C. § 102(a). [↑](#footnote-ref-322)
323. 17 U.S.C. § 101. [↑](#footnote-ref-323)
324. Rosenblatt, *Appropriation Ratchet*, *supra* note \_\_\_, at 617. [↑](#footnote-ref-324)
325. Behzadi Cardenas, supra note \_\_\_\_\_\_\_\_. [↑](#footnote-ref-325)