Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship

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COPYRIGHT SOCIAL UTILITY AND SOCIAL JUSTICE INTERDEPENDENCE: A PARADIGM FOR INTELLECTUAL PROPERTY EMPOWERMENT AND DIGITAL ENTREPRENEURSHIP

Lateef Mtima*

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**ABSTRACT**

While advances in digital information technology offer extraordinary possibilities for the exploration and exploitation of literary and artistic expression, these advances also present unprecedented opportunities for intellectual property (“IP”) empowerment and the achievement of singular milestones in copyright social justice. The ostensible conflict between copyright digital social utility and digital commoditization has engendered a reemphasis upon the social engineering obligations of the copyright law, and a search for copyright policies which will harmonize these corrigible objectives. Doctrinal constructions of the copyright law which acknowledge the law’s congenital social justice characteristics, however, can achieve this equilibrium.

The revisualization of the copyright law as an engine for the socioeconomic advancement of marginalized communities, complimented by a concomitant respect for traditional copyright property interests, will enhance the application of digital information technology to the cause of intellectual property development, exploitation, and social empowerment. Such recognition of copyright social utility/social justice interdependence, and the development of affirmative mechanisms designed to promote more equitable access to the copyright infrastructure and to correct historical problems of copyright social injustice, will ultimately produce a more diverse pool of stakeholders in the copyright property rights sub-regime. Accordingly, the promulgation of “Digital Entrepreneurship” affirmative initiatives to promote grassroots copyright participation and empowerment will not only further the social justice agenda of the law, but will also appropriately preserve its author incentive function and related copyright social utility mechanisms in the digital information age.

Responsibly incorporated into the copyright regime, the copyright social utility potential of digital information technology can be fulfilled. A socially balanced approach to digital age copyright reveals intellectual property empowerment policy initiatives; it further suggests the construction of a fluid compulsory license scheme, which should include a flexible royalty scale assessing non-commercial, quasi-commercial, and commercial payment levies, buttressed by an express unconscionability mechanism, to symbiotically assure a progressive response to digital copyright conflicts. “Digital Entrepreneurship” and other
copyright social utility/social justice interdependence analyses and stratagems can thus be applied toward easing some specific tensions among modern copyright constituencies, and bridging contemporary copyright social utility and commoditization interests.

INTRODUCTION

With the advent of the digital information age there has been a refocus of scholarly, policy, and professional attention toward the social utility and social justice obligations of the copyright law. Digital information technology has provided unheralded opportunities for the development, dissemination, and exploitation of individual creative expression. Such technological advance has made possible unprecedented access to copyrighted material through the Internet and a variety of digital media formats. In addition, these advances have enabled copyright end-users to engage in new forms of creative expression, not only with respect to their own original expression, but through the reuse or “remix” of pre-existing (and previously static) copyrighted material. In the context of global culture, digital information technology presents attractive possibilities for heretofore marginalized groups and cultures to share their indigenous creative expression, not only toward the education of outsiders about their aesthetic customs and cultural beliefs, but also in the cause of economic independence and socio-political empowerment.

Notwithstanding this plethora of artistic and educational boons, digital information technology also presents formidable challenges to the social utility structure of the copyright law. While many Americans now enjoy greater access to the national (and multi-national) store of copyrighted works, due to a persistent Digital Divide, other citizens remain isolated from such benefits, and in some cases, their access to copyrighted works has actually diminished as digital formats become the dominant medium for creative expression. Perhaps an even greater challenge is posed to the copyright incentive scheme of authors’ exclusive property rights. Because of the ease in which end-users of copyrighted works can now engage in the unauthorized digital use of such material, “digital remix opportunities” pose a serious threat to the property rights of copyright owners, undermining traditional copyright compensation expectations. Finally, just as digital information technology proffers new avenues for the socially beneficial exploration and use of marginalized indigenous cultural expression, it also presents new methods for cultural pillaging and other unwelcome and inequitable intrusions upon sacred and otherwise revered cultural practices and belief systems.

These issues have engendered a refocus upon the social utility/social justice objectives of the copyright law, as a means by which to resolve the Gordian dilemmas they embody. In many cases, the problem is perceived as a direct and often vitriolic conflict between the proponents of the copyright social benefits that digital information technology can bestow upon society as a whole, and those who favor the commoditization interests of individual copyright owners,
particularly the commercial copyright industries. Consequently, resort to the overarching social utility goals of the copyright law provides an appealing, perhaps even compelling option for balancing these competing copyright objectives. Indeed, even broader questions regarding digital and other dissemination and exploitation of creative cultural expression outside the protection of the copyright regime can be addressed through empathic invocation of the social utility goals of the copyright law, by balancing society’s interest in the expansion of its store of aesthetic expression against the ultimate benefits that can be gained by exercising appropriate respect for foreign and marginalized cultural institutions and customs.

The West Virginia Law Review 2009 Symposium “Digital Entrepreneurship: The Incentives and Legal Risks” presents a valuable opportunity to explore and formulate socially responsible strategies to resolve these issues in compliance with the overarching goals of the copyright law. Persistent problems of copyright social injustice can impede the social efficacy of the copyright law, and thereby reveal a functional interdependence between copyright social utility and copyright social justice. In acknowledging this interdependence, proactive policies and strategies can be developed to promote symbiotic social justice/social utility mechanisms, and to encourage Digital Entrepreneurship (i.e. the application of traditional entrepreneurial tenets in the cause of intellectual property development and exploitation) to foster intellectual property empowerment and concomitant socio-economic advance. In addition to advancing social justice, Digital Entrepreneurship principles also encourage ardent respect for the copyright exclusive rights scheme and related property interests and incentives. This is so because fundamental entrepreneurial precepts favor the recognition of today’s “copyright entrepreneurs” as tomorrow’s “copyright vested gentry,” who will undoubtedly seek out and embrace the compensatory boons attendant to copyright ownership.

In short, when viewed through the lens of copyright social utility/social justice interdependence, and redressed through stratagems of Digital Entrepreneurship, the copyright disenfranchisement of marginalized groups and the socially empowering but nonetheless unauthorized use of copyrighted material can be addressed in concert with efforts to preserve the exclusive rights regime. Digital Entrepreneurship strategies align copyright social empowerment and author incentive as mutually reinforcing, as opposed to mutually exclusive objectives, and therefore advance the interests of all constituents in the digital copyright community.

Analytical Schema

Part I of this essay will briefly discuss the inherent social utility mandates manifest within Article I, Section 8 of the Constitution, and the related question of social justice imperatives implicated by the Copyright Clause. This Part will recount how the courts and Congress have consistently worked to satisfy the social engineering directive of the Copyright Clause, through application
of mechanisms such as the Fair Use Doctrine and legislative compulsory copyright license schemes, in the proper subordination of authors’ property interests in favor of society’s broader cultural requirements. Notwithstanding these proactive efforts to secure copyright social utility, however, the extent to which a more expansive agenda of copyright social justice can or should be achieved under the law has remained less clear.

Part II will consequently explore the question of copyright social justice as a Constitutional imperative. Digital information technology crystallizes the contemporary commoditization versus societal social benefit conflict by redirecting scholarly attention toward the social utility mandate of the Copyright Clause. Whereas the social utility function of the copyright law is generally accepted, however, the law’s social justice obligations are less well defined. In delineating a copyright social justice mandate, Part II will begin by clarifying the overlap/distinctions between social utility and social justice mechanisms, defining mechanisms of social utility as initiatives designed to promote useful, pragmatic social benefits to society, such as an increase in creative output, as contrasted with mechanisms for social justice, which are generally intended to effectuate pervasive fairness and equity. Digital information technology offers unique social utility benefits, such as enhanced end-user access to and interaction with copyrighted material, but it also holds the promise for equitable copyright access for all members of society. The prospects for such dual impact boons provide a compelling context in which to assess the full social utility/social justice potential of copyright protection in the digital information age.

Against this backdrop, Part II will illustrate how obstructive problems of copyright social injustice can impede the social efficacy of the copyright law, and thereby reveal a functional interdependence between copyright social utility and copyright social justice. When copyright social injustice interferes with copyright social utility, the Copyright Clause mandates that the courts and Congress take appropriate affirmative action to correct the pertinent social inequities and deficiencies. In addition, Part II will demonstrate how the recognition of copyright social utility/social justice interdependence can provide the basis for affirmative copyright social justice policies and stratagems, and will accordingly propose Digital Entrepreneurship as one such strategy through which the historically marginalized and underserved can achieve intellectual property empowerment.

Finally, Part III will explore Digital Entrepreneurship as an affirmative Intellectual Property empowerment and social justice methodology. In essence, Digital Entrepreneurship involves the application of traditional entrepreneurial tenets and principles toward the cause of intellectual property development, dissemination, and exploitation, and attunes these mechanisms to the social utility/social justice function of the intellectual property law. As an engine for copyright social justice, Digital Entrepreneurship promotes IP education, the safeguarding of marginalized authors’ IP property rights, and encourages the entrepreneurial exploitation of intellectual property as means for socioeconomic advancement. As a tool for copyright social utility, Digital Entrepren-
neurship cases the digital commoditization/social utility conflict, by providing an analytical framework for a digital use compulsory license scheme. Part III proffers that a copyright social utility/social justice interdependence approach to the issue suggests the construction of a compulsory license scheme which (i) assesses non-commercial, quasi-commercial, and commercial royalty rates; (ii) balances the availability of suitable alternatives to unauthorized use and the significance of the protected material to the unauthorized use; and (iii) evaluates the apparent applicability of legitimate traditional copyright doctrines such as Fair Use. In addition, the compulsory licensing scheme would include an express unconscionability provision, to curtail the problem of adhesive and otherwise unfair bargaining leverage, constructed specifically for the intellectual property context, to better serve the overarching objectives of the copyright law.

Accordingly, the recognition of copyright social utility/social justice interdependence and the implementation of concomitant Digital Entrepreneurship strategies can effectuate the intellectual property empowerment and social advancement of previously marginalized groups, while advancing the overarching goals of the copyright law. In this manner, digital information technology can be exploited to its fullest in the achievement of the social utility and social justice objectives of the copyright law, and the fulfillment of the law’s ultimate social engineering promise.

PART I. ACHIEVING THE SOCIAL UTILITY MANDATE OF THE COPYRIGHT LAW

A. Copyright Protection as a Social Engineering Tool

Article I, Section 8 of the Constitution expressly denotes copyright protection as a social engineering mechanism for advancing and shaping American culture. The literal Constitutional directive empowers Congress to adopt laws to promote the arts and sciences, so as to advance cultural and technological

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1 U.S. CONST. art. I, § 8, cl. 8 (bestowing upon Congress the authority “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.”). See generally Stacy F. McDonald, Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright Clause, 50 HOW. L.J. 541, 542–43 (2007) (“Article I, Section 8, Clause 8 of the U.S. Constitution, often called the Copyright Clause, empowers Congress to grant creators a limited monopoly over their works, both as an incentive to and reward for creating new works. In exchange, the public benefits from the dissemination of and access to the work while it is protected and, later, from an enriched and abundant public domain once the copyright expires. Thus, the Copyright Clause facilitates what is, in effect, a social bargain that seeks to achieve what the Framers envisioned as one of the primary goals of copyright: the promotion of learning.”); Edward T. Saadi, Sound Recordings Need Sound Protection, 5 TEX. INTELL. PROP. L.J. 333, 335–36 (1997) (“The United States Constitution explicitly grants to Congress the power to pass laws governing copyright. The purpose behind this grant of authority is to encourage the creation of works of artistic and scientific value by providing the incentive of an exclusive monopoly over the benefits of that creation for a limited time . . . . The congressional purpose in granting these exclusive rights was purely utilitarian; it was not based upon the natural rights of authors in their works.”).
achievement, and to amend such laws as necessary to ensure their continued efficacy.\(^2\)

With respect to the copyright law, specific, exclusive property rights are afforded to authors under the Copyright Act as a means by which to spur artistic endeavor.\(^3\) At the same time, however, corollary rights and privileges to make

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\(^2\) See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’” (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954))); 1 PAUL GOLDSCHMIDT, COPYRIGHT § 1.14 (2d ed. 2002) [hereinafter GOLDSTEIN]; 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.01[A] (Matthew Bender ed., rev. ed. 2002) [hereinafter NIMMER & NIMMER]; Scott L. Bach, Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law, 14 HOFSTRA L. REV. 379, 383 (1986) (“The limited monopoly policy of copyright law arises from . . . the Constitution . . . . Underlying the [copyright clause] is the principle that society will be harmed if artists are not given exclusive rights to exploit their works for a limited time, because the lack of such rights would discourage artistic creativity. Thus, granting a limited monopoly in copyright advances the public interest because it encourages artists to create through the prospect of financial gain. The eventual termination of the monopoly assures the public good, because it allows the assimilation of artistic works into society, which is the ultimate objective of copyright law.”) (citations omitted); Justin Hughes, The Philosophy of Intellectual Property, 77 GEO. L.J. 287, 291 (1988) (“Intellectual property is often the proprietaryization of what we call "talent."”); Jason S. Rooks, Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases, 3 J. INTELL. PROP. L. 255, 257 (1995) (“Read literally, three fundamental policies are advanced by the [copyright] clause: (1) to promote learning . . . ; (2) to benefit authors . . . ; and (3) to ensure public access . . . . Of these three policies, two benefit the public and one the author; and the benefit to the author is a means to the ends of promoting learning and protecting the public domain.”).

\(^3\) See, e.g., Harper & Row, 471 U.S. at 546–47 (“Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright. Under the Copyright Act, these rights — to publish, copy, and distribute the author's work — vest in the author of an original work from the time of its creation. In practice, the author commonly sells his rights to publishers who offer royalties in exchange for their services in producing and marketing the author's work.”) (footnotes and citations omitted); Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 429 (1984); GOLDSCHMIDT, supra note 2, at § 1.14; Michael G. Anderson & Paul F. Brown, The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law, 24 LOY. U. CHI. L.J. 143, 158–59 (1993) (“Copyright law vests a bundle of rights in the creator of certain kinds of intellectual property . . . . Copyright law, both ancient and modern, is founded on the fundamental, though perhaps implicit, notion that adverse economic incentives are created if unrestricted [use] of intellectual products is permitted. When adverse incentives exist, society will not have as much creative innovation as it wishes to encourage. Therefore, the emphasis of copyright law is on the benefits derived by the public from the creative efforts of authors. Reward to copyright owners or authors is a necessary but secondary consideration.”) (citations omitted); Lateef Mtima, Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 369, 396–98 (2004) [hereinafter Tasini and Its Progeny] (“Pursuant to article 1, Congress has the power ‘[t]o 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 . . . .’ In accordance with this constitutional mandate, both Congress and the courts have determined that the ‘overarching object of copyright law in the United States is to encourage the widest possible production and dissemination of literary and artistic works.’ Through widespread production and dissemination, the greatest amount of creative works are likely to reach the largest audience, who will not only benefit from exposure to these
use of copyrighted material are reserved to the public. Together, the recognized rights and interests of authors and the public are intended to form a synergistic framework to effectuate the social utility objectives of the Intellectual Property Clause.

Whereas Congress has responsibility for adopting and maintaining a copyright legal regime, it falls to the courts to ensure that the system of complementary author/public rights and privileges is interpreted and applied such that the copyright social utility equipoise remains in proper alignment. Judicial interpretation and application of the copyright law to specific disputes and con-

4 See, e.g., Kelly v. Arriba Soft Corp., 336 F.3d 811, 817 (9th Cir. 2003) (“A claim of copyright infringement is subject to certain statutory exceptions, including the fair use exception.”); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1399 (9th Cir. 1997) (“[The Fair Use Doctrine] permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”). See generally Fred Koenigsberg, Lines of Defense: An Analytic Framework for the Defense of Copyright Infringement, Landslide, Vol. 1, No. 5, p. 36, 39-40 (May/June 2009).

5 See, e.g., Steven D. Jamar, Copyright and the Public Interest from the Perspective of Brown v. Board of Education, 48 How. L.J. 629, 639 (2005) (“The Copyright Act creates a number of rights that attach to original works of authorship fixed in a tangible medium of expression. But, many of those rights are subject to limitations and exceptions in the Copyright Act itself for reasons of public policy. These limitations serve to balance some of the competing interests among creators, owners, marketers, users, consumers, and others. In some instances, the limitations affect the public interest in developing information and advancing the arts and sciences. That is, Congress decided that the rights should be limited and various uses that would otherwise infringe should be permitted. These limitations do not result in the works being put in the public domain, but they do make lawful certain uses of the works that would otherwise be infringing.”); Tasini and Its Progeny, supra note 3, at 400–01 (“In this way, the copyright law fulfills the constitutional objective of the promotion of the arts and sciences. The mechanism of exclusive rights secures authors with property rights in their creative works, and thereby provides them with the opportunity for financial gain, the secular incentive to create. This incentive assures an abundance of creative works and ‘reflects the belief that property rights [in creative works], properly limited, will serve the general public interest in an abounding national culture.’ Finally, the mechanism of exclusive rights is ‘properly limited’ or counterbalanced by the fact that outside of the exclusive rights, the public is free to use, enjoy, and build upon an author’s copyrighted work, thereby ‘allow[ing] others to draw [up] on these works in their own creative and educational activities.’”)

6 See, e.g., Marc A. Hamilton, Copyright at the Supreme Court: A Jurisprudence of Defense, 47 J. COPYRIGHT SOC’Y U.S.A. 317, 319–21 (2000) (“Elements of the [Supreme] Court’s . . . interpretation of the Copyright Clause . . . includ[e] an emphasis on the public good that forces author’s rights to be conditioned by the public . . . . From the first case, through the present, the Court has treated copyright law as positive law, the parameters of which are determined by the Congress [as] limited by the Constitution’s strictures.”).
troversies often clarifies the legal rights and interests created under the Copyright Act, and further assure that the law’s policy goals are not only achieved, but adapted to contemporary challenges. Thus, both Congress and the courts have independent albeit complimentary responsibilities to ensure that the copyright law serves to promote the development, use, and exploitation of artistic expression and to thereby satisfy the copyright social engineering directive set forth in the Constitution.

B. Preserving Copyright Social Utility in the Courts: The Fair Use Doctrine

Throughout the history of American copyright, the affirmative efforts of Congress and the courts to preserve the social utility function of the copyright law have been directed principally at preventing the author incentive/property right mechanisms from impeding the fundamental purpose of copyright protection, that of promoting literary and artistic endeavor.

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8 See, e.g., Lydia Pallas Loren, Untangling the Web of Music Copyrights, 53 CASE W. RES. L. REV. 673, 675 (2003) [hereinafter Untangling the Web] (“The fundamental purpose of copyright law is to promote the progress of knowledge and learning. Thus, examining the reasons to provide a preference for the author over the public becomes critical.”); McDonald, supra note 1, at 543–44 (“After recent years of litigation and legislation, fueled by rapid technological change, instead of a social bargain, ‘we now survey a battlefield that pits private interests against the public good.’ . . .

One cause of these copyright battles is a commodification mentality, a subtle, yet acute, shift in the conceptualization of copyright law that has upset the balance. When viewed through this commodification lens, a copyrighted work looks like an ‘undifferentiated product,’ such as wheat or oil, whose market value stems solely from the owner’s right to sell it. A copyrighted work becomes valued for its profitability, rather than its contribution to education, public discourse, or intellectual enlightenment. [T]he commodification of intellectual property distorts the copyright balance by valuing a copyrighted work for its market potential over, above, and to the exclusion of its non-economic values. Rather simplistically, the content industry believes that the public is benefited solely because the products are on the market, ready for mass consumption. This commodification mentality excises from the equation the social bargain inherent in the Copyright Clause, as well as what the Framers considered to be the goals of the copyright system.”); L. Ray Patterson, Copyright and “The Exclusive Right” of Authors, 1 J. INTELL. PROP. L. 1, 41–42 (1993) (“One’s conclusion as to the nature of copyright is determined by one’s view of its source. A coherent and consistent view of copyright requires that the source be Congress, which can grant the author only the right to publish and vend, with only such extensions as do not subordinate constitutional policies to the cause of private profit. The point is that copyright law is more regulatory than proprietary in nature, for only the regulatory concept makes any sense in view of the three policies that the Copyright Clause mandates: promotion of learning, protection of the public domain, and benefit to the author.”).
of American copyright, the courts recognized an inherent public privilege to make “fair use” of copyrighted works, and thus to intrude upon a copyright owner’s exclusive property rights for the purpose of educational and literary discourse and comment.\(^9\) The judicially created Fair Use Doctrine has since developed into the predominant juridical tool for balancing author property rights against the social utility demands of the copyright law.\(^{10}\)

The Fair Use Doctrine is an “equitable doctrine [which] permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes.”\(^{11}\) The Fair Use Doctrine enables the copyright law to account for those situations in which a specific unauthorized use of copyrighted material will have little to no impact upon the author’s overall incentive/compensation interests, and the social utilities to be achieved in permitting the use warrants a limited intrusion upon the copyright holder's exclusive property rights.\(^{12}\)

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9 See 17 U.S.C. § 107 (2002); Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901); Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1105 (1990) [hereinafter Fair Use Standard] ("Not long after the creation of the copyright law by the Statute of Anne of 1709, courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as ‘fair abridgment,’ later ‘fair use,’ would not infringe the author's rights. In the United States, the doctrine was received and eventually incorporated into the Copyright Act of 1976 . . ."); see also Harper & Row, 471 U.S. at 549 (“Fair use was traditionally defined as ‘a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.’ . . . The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common law doctrine.”) (citations omitted).

10 See, e.g., Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1520–27 (9th Cir. 1992); Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp., 387 F. Supp. 2d 521, 535–37 (M.D.N.C. 2005); Fair Use Standard, supra note 9, at 1105; Pamela Samuelson, Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega, 1 J. Intell. Prop. L. 49, 51 (1993) [hereinafter Fair Use for Computer Programs] ("Fair use has historically served as a flexible and adaptable mechanism for balancing the interests of copyright owners, their competitors or potential competitors, and the public to fulfill the larger purposes of copyright law which have traditionally been understood to be promoting the production and dissemination of knowledge.").

11 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574–77 (1994); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448–51 (1984); SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264 (11th Cir. 2001); Rogers v. Koons, 960 F.2d 301, 308 (2d Cir.1992); Sega Enters., 977 F.2d at 1522; Fair Use Standard, supra note 9, at 1127 ("Fair use was a judge-made utilitarian limit on a statutory right. It balances the social benefit of a transformative secondary use against injury to the incentives of authorship."); Field v. Google, Inc., 412 F. Supp. 2d 1106, 1117 (D. Nev. 2006) ("The fair use doctrine ‘creates a limited privilege in those other than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent,’ . . . and permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.") (citations omitted); I Fred Koenigsberg, Copyrights, in UNDERSTANDING BASIC COPYRIGHT LAW 2002, at 147–48 (PLI Patents, Copyrights, Trademarks, and Literary Prop., Course Handbook Series No. G0-0101T, 2002); Nimmer & Nimmer, supra note 2, at § 13.05.

12 See, e.g., 2 Paul Goldstein, COPYRIGHT, § 10.2.1 (2d ed. 2002) ("At the highest level of generalization, [fair] uses characteristically involve situations in which the social, political and
The Fair Use Doctrine is one of the salient mechanisms through which the overarching policy objectives of the copyright law are attained, including the broadest use and dissemination of creative works toward the greater public good. ¹³ The Fair Use Doctrine ensures that the author’s property incentive mechanism does not overshadow important societal interests in particular cases wherein the author’s property interests should be subordinated to the social utility needs of society as a whole. ¹⁴

¹³ See Appel, supra note 12, at 167 (“[Exclusive] rights constitute the ‘bundle of rights’ that comprise copyright. Thus, they constitute the core of copyright protection. However, the Copyright Act also sets forth several limitations upon the exclusive rights. The most important of these . . . is the doctrine of fair use, which permits unauthorized use of a copyrighted work where such use, as a matter of public policy, is ‘fair.’ The statutory provision regarding fair use provides that: ‘the fair use of a copyrighted work including such use . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship or research is not an infringement of copyright.’”) (footnote omitted).

¹⁴ See, e.g., Fair Use Standard, supra note 9, at 1107 (“The Supreme Court has often and consistently summarized the objectives of copyright law. The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.”). As it would be unworkable to predetermine a list of all circumstances in which the equitable social utilities outweigh the copyright holder's interest in denying or restricting the use of his or her work, courts instead weigh four factors in evaluating whether an unauthorized use should be permitted as a fair use. In 1976, Congress codified the Fair Use Doctrine as Section 107 of the Copyright Act, setting forth therein the four non-exclusive Fair Use factors: (1) the purpose and the character of the use, such as whether it is primarily commercial in nature or if it is a transformative use, that is, a use that enhances or builds upon original use for the copyrighted work; (2) the nature of the copyrighted work involved, that is, whether it is primarily a creative work such as a fiction novel or a factual work such as a biography; (3) the amount and实质性 of the work used without the author's permission; and (4) the effect that allowing the unauthorized use is likely to have upon the market for the copyrighted work. 17 U.S.C. § 107; Campbell v. Acuff-
The Fair Use Doctrine can be particularly important in the context of new technological uses for copyrighted works. When a new technological use for copyrighted material is introduced, it can obscure the boundary between authors’ exclusive rights and the rights and privileges necessarily reserved to the public.\textsuperscript{15} This is sometimes the case because it may not be immediately clear as to whether the new technological use replicates one of the enumerated exclusive rights.\textsuperscript{16} Even where the new use clearly encompasses an exclusive right, however, the overarching social utilities which underlie copyright protection may warrant a public privilege to participate in the new use.\textsuperscript{17} In many new technol-
ogical use copyright disputes, it will initially fall to the courts to clarify or delineate the contours of the copyright owner’s property rights, or otherwise balance the competing social utilities. In these situations, courts often rely upon the Fair Use Doctrine to realign the respective rights and expectations of authors and the public in connection with a particular new use for copyrighted material.

C. Fair Use and Unauthorized Digital Use of Copyrighted Material

Almost from the very outset of the proliferation of digital information technology it posed a formidable threat to copyright owner property right except that the interjection of that interest could tip the balance in favor of permitting a detrimental impact upon the copyright holder’s commercial interests . . .

See Jon M. Garon, Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics, 88 CORNELL L. REV. 1278, 1309–10 (2003) (“The role of the common law and legislature is to balance property and liability interests . . . . If all property is subject to the legal balance between the exclusive owner and the public, then intellectual property is merely the realm in which the balancing is most explicitly acknowledged . . . . The Supreme Court has repeatedly recognized the power of Congress to adjust the balance of rights between authors, publishers, and the public . . . . The normative question is not whether such balancing can take place, but how to create a reasoned framework for setting or shifting the balance.” (footnotes omitted)); Jessica Litman, The Exclusive Right to Read, 13 CARDOZO ARTS & ENT. L.J. 29, 39 (1994) (“It is difficult for intellectual property laws to keep pace with technology. When technological advances cause ambiguity in the law, courts rely on the law’s purposes to resolve that ambiguity. However, when technology gets too far ahead of the law, and it becomes difficult and awkward to apply the old principles, it is time for reevaluation and change. ‘Even though the 1976 Copyright Act was carefully drafted to be flexible enough to be applied to future innovations, technology has a habit of outstripping even the most flexible statutes.’ The coat is getting a little tight. There is no need for a new one, but the old one needs a few alterations.” (quoting H.R. REP. No.101-735, at 7 (1990)); Robert H. Thornburg, The Presumption Against Implied Transfer of Electronic Rights in Licenses Under Section 201(c) of the 1976 Copyright Act: A New Right for the Bundle, 2002 U. ILL. J.L. TECH. & POL’Y 235, 237 (2002) (“While copyright vests appropriate rights in an author in order to compensate her for her labor, it also seeks to protect the public from unreasonable seizures of works already in the public domain.”).

For example in Sony Corp. of America, 464 U.S. at 417, the case involved a classic “new technological use” copyright challenge. The Sony case presented a new technological use problem, but from an atypical posture. In a typical Fair Use case, a finding that an authorized use qualifies as a Fair Use applies only to the parties and activity specifically before the court, although subsequent unauthorized users can invoke the court’s determination as precedent. In Sony, however, instead of being asked to assess a particular instance of unauthorized activity, the court was effectively asked to categorize generally an activity as either author exclusive or as a Fair Use. Despite the unusual litigation sequence pursued in the resolution of the issue, however, the ultimate legal impact of the decision is the same: members of the public who engage in unauthorized time-shifting can rely upon the Fair Use Doctrine to shield their conduct from copyright liability. In many respects, the analysis in Sony is more reminiscent of that undertaken when a copyright compulsory license is under consideration, where the unauthorized use is being evaluated with respect to its importance to the copyright social utility objectives as a whole. As discussed in the next sub-section, in these situations, Congress must determine the appropriate copyright allocation of a use that is important to the author incentive mechanism of the copyright law, but as to which widespread engagement is equally vital to the cause of society’s cultural advancement.
tations. One of the earliest judicial resolutions in this ongoing conflict between the author’s exclusive rights and the public’s desire to explore digital use of copyrighted material was undertaken by the Ninth Circuit in Kelly v. Arriba Soft Corp. The defendant Arriba had compiled a searchable database of more than two million “thumbnail images,” that is, reduced versions of images that were already available on the Internet at various web sites. By utilizing defendant’s search engine, the Arriba Vista Image Searcher, a user could retrieve a visual index of the thumbnail images, which also contained hyper links to the full size images at the originating web sites. By clicking on a thumbnail image, the user could automatically link to the web site where the original image actually resided, and among other things, could then see the full size version of the image and either the originating web site’s web address or the actual originating web page.

The plaintiff Kelly was the owner of one of the originating web sites and some of the copyrighted images re-created as thumbnails in Arriba’s database. Among other things, Kelly claimed that Arriba’s unauthorized use of his images to create the thumbnails and the search engine data base constituted unauthorized engagement in his exclusive reproduction and derivative work rights.

In response to Kelly’s copyright infringement claims, Arriba invoked the Fair Use Doctrine. With regard to the first Fair Use factor, the court found Arriba’s use to be only “incidentally commercial”:

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20 See Lateef Mtima, *The Changing Landscape of Internet Use and Dissemination of Copyrighted Works: New Tools, New Rules, or the Same Old Regime?*, THE COMPUTER & INTERNET L., Vol. 24 at 4 (Oct. 2007) (“Up until the digital technological revolution, the . . . division between the copyright holder’s exclusive rights and the public uses and privileges worked relatively well. Copyright owners routinely granted assignments and licenses of their exclusive rights to commercial users of their work, such as publishers who wished to make multiple copies and distribute them for sale to the public. In as much as authors thereby authorized only the sale of individual copies of their works to the general public, they granted the public no right to engage in any 106 exclusive rights’ activities (such as making copies) in connection with the authors’ works . . . . Notwithstanding the copyright division of authors’ rights and public privileges, however, the real reason that members of the public were not likely to infringe upon a copyright holder’s exclusive rights...was one of basic practicality. Making multiple copies and/or engaging in the mass distribution of copyrighted material was an expensive undertaking, and one that was difficult to conceal. With the advent of digital technology, however, the practical obstacles to surreptitious copyright infringement largely disappeared. Today, possession of a single digital copy enables reproduction and distribution of a copyrighted work to an infinite number of people — and all from the privacy of a personal laptop.”).

21 77 F. Supp. 2d 1116 (C.D. Cal. 1999), modified, 336 F.3d 811 (9th Cir. 2003).


23 *Kelly*, 336 F.3d at 815–16. In addition, Plaintiff Kelly also claimed that the unauthorized hyperlink constituted copyright infringement, and that because the thumbnail images did not reproduce the attendant copyright notices from the originating web site, they were also in violation of the Digital Millennium Copyright Act. See generally id.
There is no dispute Defendant operates its Web site for commercial purposes. Plaintiff’s images, however, did not represent a significant element of that commerce, nor were they exploited in any special way. They were reproduced as a result of Defendant’s generally indiscriminate method of gathering images . . . so it can provide more complete results to the users of its search engine . . . While the use here was commercial, it was also of a somewhat more incidental and less exploitative nature than more traditional types of ‘commercial use’.  

Moreover, the court held that Arriba’s use was socially beneficial and therefore transformative:

The most significant factor favoring Defendant is the transformative nature of its use of Plaintiff’s images . . . Plaintiff’s photographs are artistic works used for illustrative purposes. Defendant’s visual search engine is designed to catalog and improve access to images on the Internet . . . The character of the thumbnail index is not esthetic, but functional; its purpose is not to be artistic, but to be comprehensive.

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24 Kelly, 77 F. Supp. 2d at 1119; aff’d 336 F.3d 818–20; see also Tasini and Its Progeny, supra note 3, at 436–41 (“Under the first [Fair Use] factor, notwithstanding the publishers’ commercial objectives, there is also a compelling public interest in digital archiving and dissemination that could outweigh the contributing copyright holder’s ancillary commercial interests. Despite the importance of the author’s remunerative rights, ensuring digital dissemination of previously published printed works provides a vital public benefit . . . Finally, in so far as the fourth fair use factor is concerned . . . the existence or extent of stand-alone digital re-publication markets for individual contributory works remains debatable. Prior to the development and proliferation of digital information technology, the market for re-publication of contributory works was limited . . . It is likely that few if any of the contributory articles in many popular collective works have any digital re-publication market beyond their role in making a digital archive complete . . . If there is no genuine stand-alone market for digital re-publication of certain contributory articles, then the fourth fair use factor weighs in favor of allowing digital re-publication of those articles as part of the collective works in which they appear, lest the public interest in digital archives be denied to preserve an illusory interest on the part of freelance copyright holders.”) But cf. Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 847 (C.D. Ca. 2006) (finding that the creation of “thumbnails” that are almost the same size as the originals is not a Fair Use; “Merely because Google's thumbnails are not cropped does not necessarily make them exact copies of P10's images, but the record currently before the Court does suggest that the thumbnails here closely approximate, a key function of P10's full-size originals, at least to the extent that viewers of P10's photos of nude women pay little attention to fine details.”).

25 Kelly, 77 F. Supp. 2d at 1119, aff’d 336 F.3d 818–19; see also Ticketmaster v. Tickets.com, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. 2000) (unauthorized hyper link does not constitute per se infringement); Niels B. Schaumann, An Artist’s Privilege, 15 CARDOZO ARTS & ENT. L. J. 249, 267 (1997) (“Courts and commentators in recent years have stressed the idea that to be fair, a use should be ‘transformative.’ A transformative use constitutes creative departure from the original work. Access to such a creative departure is presumably in the public interest; if the use meets this
Consequently, the court ruled that the first factor weighed in favor of permitting the use.\textsuperscript{26}

With regard to the second Fair Use factor, the court ruled that as previously published works, the aesthetic (as opposed to factual) nature of Kelly’s works weighed only slightly against the unauthorized use. As for the third factor, the court held that the nature of Arriba’s use made it necessary that the entire work be copied, and consequently this factor weighed neither for nor against the use.\textsuperscript{27} Finally, with respect to the fourth factor, the court found that Arriba’s use did not negatively impact Kelly’s market for his works, as the thumbnail images could not serve as a substitute for the original versions; end users interested in Kelly’s photographs were unlikely to acquire the thumbnails in lieu of the full size originals. Consequently the court decided that the Fair Use analysis weighed in favor of permitting Arriba’s use.\textsuperscript{28}

In sum, the court invoked the Fair Use Doctrine to preserve the overarching social utility function of the copyright law. Where the unauthorized digital use of copyrighted works to create a search engine will benefit the copyright public interest without diminishing the copyright holder’s legitimate compensation expectations, the Fair Use Doctrine compels that the unauthorized use be allowed.\textsuperscript{29}

criterion, it is more likely to be held non-infringing than if it is not transformative. This analysis dovetails well with the market-impact approach discussed immediately above, insofar as market substitution of a transformative work for the copied work is less likely than the substitution of a nontransformative work: a ‘transformative’ work is by definition different in some important way from the copied work, and therefore is probably not a good substitute. Thus, to the extent a use is transformative, adverse market impact is less likely.”).

\textsuperscript{26} See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). The prerequisites to the characterization of a use as transformative are somewhat unsettled; some courts follow the line of reasoning evident in Arriba, which emphasizes that the use sound in a different, non-competing market as compared with the market for the underlying work; other courts require some creative change or addition to the work to be a part of the transformation. See, e.g., UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000); Infinity Broad. Corp. v. Kirkwood, 150 F. 3d 104, 108 (2d Cir. 1998). In addition to the question of the kind or extent of actual transmogrification, courts have begun to focus on the benefit of the use upon the public interest. See, e.g., lateef Mtima, So Dark the CON(TU) of Man, 70 U. PITT. L. REV. 1 (2009) [hereinafter So Dark the CON(TU) of Man].

\textsuperscript{27} Kelly, 336 F.3d at 820–21.

\textsuperscript{28} Id. at 822.

\textsuperscript{29} See Fair Use Standard, supra note 9, at 1125 (“Not every type of market impairment opposes fair use.”); So Dark the CON(TU) of Man, supra note 26, at 85 (“Delineating the commercial market for a copyrighted work has long been an arduous task for the courts . . . the mere fact that someone has found a way to profit from the use of a copyrighted work does not automatically render that use one within the commercial or ‘copyright market’ for the work.”); Frank Pasquale, Breaking the Vicious Circularity: Sony’s Contribution to the Fair Use Doctrine, 55 CASE WES. RES. L. REV. 777, 783–84 (2005) (“Like the fair use doctrine generally, ‘effect on the market’ analysis is in flux. There are a few fixed guideposts: clearly commercial uses are suspect, and ‘transformative’ or ‘productive’ uses are treated more favorably than mere copying. Courts must keep in mind not only the case at hand, but also its potential ramifications: a use is not fair if ‘it would adversely affect the potential market for the copyrighted work’ should it ‘become wide-
Of course, *Arriba* is not to be construed as a blanket public privilege to engage in unauthorized search engine or other digital use of copyrighted material, even in the cause of social utility.\(^{30}\) Even where the public interest is implicated, such a comprehensive re-allocation of the authors’ enumerated exclusive rights is a question of legislative social engineering relegated to the province of Congress.\(^{31}\) Consequently, just as the courts have relied upon Fair Use to maintain the social utility balance of the copyright law, Congress has resorted to a variety of legislative mechanisms to incorporate various new technological uses into the copyright social utility regime.

D.  
_Congress and Copyright Social Utility: The Copyright Compulsory License_

Given Congress’ authority to grant authors property rights in their works by enumerating certain uses of their works as exclusive to authors, Congress has considerable latitude in determining the nature and extent of the property interests granted to authors in connection with those uses.\(^{32}\) For example, in the exercise of its discretion, Congress can exempt specific categories of public engagement in an exclusive right from author dominion.\(^{33}\) On a broader scale, Congress can choose to maintain the authors’ exclusive rights to specific uses of their works, but at the same time mandate terms upon which those uses must nonetheless be licensed to the public. When Congress elects this alternative, it fashions a “copyright compulsory license,” to both reaffirm author incentives and also guarantee widespread public engagement in a particular use of copyrighted material.

In adopting a copyright compulsory license, Congress makes the determination that insofar as the pertinent use for copyrighted material is concerned,spread.” (footnote omitted)); see generally Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

\(^{30}\) First, the Fair Use Doctrine is inherently case specific. Moreover, the Ninth Circuit has recently had occasion to revisit the issue of Internet search engines and the unauthorized use of copyrighted material. In Perfect 10, Inc. v. Amazon.Com, Inc., 508 F.3d 1146 (9th Cir. 2007), the plaintiff maintained an Internet site, which provided images of nude women to paying subscribers. *Id.* One of plaintiff’s principal copyright problems was that by using co-defendant Google’s search indices, various third parties would obtain unauthorized copies of plaintiff’s images and post them on their own websites, and otherwise use the images without permission. *Id.* These activities not only undercut plaintiff’s ability to charge subscription fees for access to its web site, but some infringers also earned advertising revenue through their illegal websites. *Id.* Among other things, *Perfect* raised the claim that it had an independent market for thumbnail versions of its images in the cell phone wall paper market. These claims were not at issue in *Arriba*.

\(^{31}\) *Tasini and its Progeny*, supra note 3, at 413–14.


the traditional “author-versus-public” allocation is inadequate to effectuate the overarching copyright social utility goals. In these situations, Congress is typically responding to the introduction of a new technological use for copyrighted material. As discussed above, new technological uses often present socially complex opportunities for promoting literary and artistic advance. A new technology may replicate an existing exclusive right, but it might also present new social utility considerations such that automatic relegation of the new technological use to authors would be inconsistent with the underlying purpose of copyright protection. To preserve the copyright social utility balance, Congress instead engages in something of a sui generis apportionment of the use between authors and the public. Accordingly, the author retains the right to receive compensation in connection with the use, but Congress sets the amount of that compensation, thereby effectively placing control over the right to engage in the use in the hands of the public.

Congress adopted the first copyright compulsory license in 1909, in connection with the then new technology of mechanical piano rolls. Prior to the introduction of this technology, it was necessary to attend a live performance in order to experience the performance of a musical work or composition. Mechanical piano rolls made mass exposure to music performance possible; local establishments could house mechanical piano players, in which proprietors could insert and play an assortment of manufactured piano rolls, much the same as an assortment of CDs can be played on today’s jukeboxes.

When mechanical piano rolls were introduced to the public, the owners of the copyrights in musical works encoded upon the rolls brought suit to enjoin

34 See, e.g., A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (Aug. 1, 1997), available at http://www.copyright.gov/reports/ (“A compulsory license is a statutory copyright licensing scheme whereby copyright owners are required to license their works to users at a government-fixed price and under government-set terms and conditions . . . . Compulsory licenses are an exception to the copyright principle of exclusive ownership for authors of creative works, and, historically, the Copyright Office has only supported the creation of compulsory licenses when warranted by special circumstances.”).

35 Pollack, supra note 15, at 2445 (“Since the advent of the Gutenberg printing press, copyright law and technology have been entangled in an ongoing legal chase. In order to advance the quintessential goal of American copyright law . . . . Congress constantly must balance the law’s objectives: to promote widespread dissemination of original creative works, while providing incentives to authors and owners to create such works. New technological advances continuously upset this balance by facilitating the ability to copy works without permission from copyright holders.”).


37 See Jennifer Mariano Porter, Compulsory Licensing and Cell Phone Ringtones: The Phone is Ringing, A Court Needs to Answer, 80 TEMP. L. REV. 907, 944 (2007).
and recover for this unauthorized use of their works.\textsuperscript{38} When the case reached the United States Supreme Court, however, the Court held that mechanical piano rolls did not constitute copies within the meaning of the copyright law, and therefore did not infringe upon the authors’ exclusive rights.\textsuperscript{39}

Subsequent to the White-Smith decision, members of the music industry lobbied Congress to have mechanical piano use expressly categorized as an author exclusive right. Similar to the circumstances of the present day, however, the copyrights in many of the nation’s popular musical works were held by a small oligopoly of companies.\textsuperscript{40} Consequently, allocating mechanical piano roll use exclusively to authors (who typically assigned their copyrights to corporate production and distribution entities) would mean that a small group of private corporations would effectively control the public access to pre-recorded performance of the nation’s store of musical works.

Congress ultimately concluded that the cultural boon presented by the introduction of mechanical piano technology was simply too important to leave to the commercial machinations of the corporate world. Instead, Congress decided to strike a socially pragmatic compromise and adopted the nation’s first copyright compulsory license.\textsuperscript{41} In fashioning this mechanism, Congress essentially categorized mechanical piano use as the embodiment of an exclusive right; however, by setting the amount of the fee that could be charged for permission to engage in this use, Congress allocated control over mechanical piano use to the general public.\textsuperscript{42}

\textsuperscript{38} White-Smith Publishing Co. v. Apollo Co, 209 U.S. 1, 9 (1908). The copyright holders argued that mechanical roll production, distribution, and use infringed upon their exclusive rights of printing, reprinting, publishing, completing, copying, executing, finishing and vending.

\textsuperscript{39} Id. at 17–18. The Court determined that a copy had to be something readable with the human eye. In adopting the 1976 Act, Congress rejected this characterization, defining a copy to include any form of fixation of the work, including embodiments that can only be perceived with the aid of device. See 17 U.S.C. 102(a) (1976); Nimmer & Nimmer, supra note 2, at § 2.03[B][1].


\textsuperscript{41} Nimmer & Nimmer, supra note 2, at § 8.23[A][1].

\textsuperscript{42} See generally Srivastava, supra note 40, at 467–68 (“A compulsory license at a fair rate could both provide fair compensation to the copyright holder and permit consumers to benefit from the advantages of new technology. For these reasons, a scheme of compulsory licensing in the market for online music distribution would serve the public interest by promoting a new technology that benefits consumers while respecting the rights of artists and promoting creative activity.”). See also Joseph E. Magri, New Media — New Rules: The Digital Performance Right and Streaming Music Over the Internet, 6 Vand. J. Ent. L. & Prac. 55, 58 (2003) (“The primary benefits of obtaining a compulsory license are that copyright owners of Sound Recordings cannot stop Webcasters from streaming their copyrighted works, and Webcasters know in advance how much it will cost them to stream copyrighted Sound Recordings over the Internet.”).
Similar to individual copyright litigations wherein courts allow unauthorized engagement in an exclusive right under the Fair Use doctrine, in applying a copyright compulsory license, Congress subordinates author incentive/property interests to the overarching copyright social utility that can be achieved in facilitating certain unauthorized uses of copyrighted material.\(^\text{43}\) Moreover, a copyright compulsory license engenders widespread engagement in a particular use of copyrighted material, and especially where new technological uses are concerned, it provides certainty as to the availability and cost of engagement in the use, and thereby promotes exploration of yet additional copyright beneficial applications for the new technology.

E. Copyright Social Utility Legislation: the Digital Millennium Copyright Act

Although Congress has not yet had occasion to adopt a copyright compulsory license in connection with digital use of copyrighted works, it has passed various laws that edify the copyright social utility function in the digital information context. Chief among these laws is the Digital Millennium Copyright Act.\(^\text{44}\) Although regarded by some as “copyright industry protectionist legislation,”\(^\text{45}\) certain of the Act’s provisions arguably serve important social utility goals.

\(^{43}\) After adopting the first compulsory copyright license, Congress would confront the problem of new technological use allocation on various occasions throughout the twentieth century. See Tasini and Its Progeny, supra note 3, at 406–08 (“In the early efforts to commercially exploit cable television technology, cable network entrepreneurs often erected broadcast receiving antennae in or near remote regions, where residents were unable to receive network television broadcasts using only conventional television sets. These antennae were erected for the purpose of capturing network broadcasts being transmitted through the air, which were then re-transmitted via cable to area residents for a fee. In response to this unauthorized use of their copyrighted broadcasts, the holders of the copyrights in televised programs instigated copyright infringement litigation against the cable entrepreneurs. The network copyright holders argued that cable re-transmission constituted an unauthorized engagement in one of their exclusive rights, specifically the exclusive right to perform their works publicly . . . . The Supreme Court ultimately ruled that cable re-transmission is closer in character to uses relegated to the public than it is to the exclusive right of public performance [relegated to copyright holders].” Once again (in response to lobbying efforts) “Congress would [effectively] overrule the Supreme Court [by expressly] designat[ing] cable re-transmission as an exclusive right, [but by doing] so in a manner that lent credence to the Supreme Court’s reluctance to approach cable re-transmission as no more than a simulation or combination of certain pre-existing exclusive rights . . . . Congress imposed a compulsory license in connection with its [de facto] designation of cable re-transmission as an exclusive right. This meant that although Congress granted copyright holders the right to profit from the new use of cable re-transmission, it did not grant them the right to control it.”).


For example, the traditional doctrines of copyright contributory and vicarious liability, through which a defendant can be held responsible for copyright infringement committed by a third party, have proven ill-suited for application to Internet activities, given the ease of surreptitious digital duplication and distribution of copyrighted material and the inability of Internet Service Providers ("ISPs") to monitor the activities of their customers. Under these principles, ISPs would be required to defend against innumerable copyright infringement lawsuits arising from their customers’ use of copyrighted material on the Internet. Considering the potential impact on the growth and availability of Internet access service, Congress incorporated certain “safe harbor” provisions into the DMCA, which effectively immunize ISPs from indirect liability claims stemming from infringement misconduct on the part of their customers. The DMCA safe harbor provisions facilitate the legitimate Internet use and dissemination of copyrighted works and the provision of Internet access service as a whole.

The DMCA also includes provisions that advance the socially productive use of computer software programs, which are protected as literary works under the Copyright Act. Whenever a computer is turned on, copies of any computer programs resident on the machine are automatically loaded on to the computer’s random access memory (“RAM”). Prior to the passage of the DMCA, some owners of copyrighted software programs argued that automatic RAM copies of their programs could not be created without their permission, as such unauthorized “copying” would technically violate their exclusive rights of reproduction. This argument was typically advanced by software copyright owners who were also in the computer maintenance business, and deployed to prevent their competitors from providing maintenance services to customers whose computers housed copyrighted programs. Obviously all functioning

the DMCA takedown procedure fails to adequately enforce copyrights, leads to violations of copyrights, and is used inappropriately to censor criticism); Brett G. Meyers, Filtering Systems or Fair Use? A Comparative Analysis of Proposed Regulations for User-Generated Content, 26 CARDOZO ARTS & ENT. L.J. 935 (2009) (discussing the short-comings of the DMCA application towards online service providers); Alfred Yen, Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment, 88 GEO. L.J. 1833, 1834, 1837–38, 1885–90 (2000) (explaining the numerous problems with the DMCA including the ambiguities in the law).


As the strategy went, as long as a copyrighted program was present on a computer, the computer could not be turned on absent the copyright holder’s permission to create automatic RAM copies of the program. Whereas such permission was implicitly granted to the owner of the
computers contain software programs, and thus third-party computer maintenance providers could not offer their services without risking copyright infringement litigation by the owners of any copyrighted programs resident on a prospective customer’s computer.

In response to lobbying efforts by various computer software constituents, Congress ultimately concluded that MAI Systems Corp. v. Peak Computer, Inc. and similar “non-volitional RAM infringement” decisions had applied the copyright law to the unique characteristics of digital information technology in a manner that undermined legitimate competition in the computer software maintenance business. Moreover, this interpretation of the copyright law adversely affected the development, use, and improvement of copyrightable software programs (all of which require that a computer be turned on) in contravention of the fundamental objectives underlying the extension of copyright protection to computer software programs. Accordingly, Congress included provisions in the DMCA which permit the unauthorized, automatic generation of RAM copies of copyrightable software programs which occurs when a computer is turned on in order to undergo maintenance service.

From issue-specific legislation such as the DMCA, to new technological use copyright compulsory licenses, Congress has historically employed a variety of legislative initiatives to implement the social utility function of the copyright law. As discussed above, the courts have achieved similar results through use of the Fair Use Doctrine. However, while such efforts constitute affirmative acts of copyright social engineering, the advent of digital information technology has spurred many IP social activists to ask whether Congress and the courts have a further obligation to undertake an even broader social agenda of achieving copyright social justice in the implementation of the copyright law. Succinctly put, if current technological developments make it possible to extend the benefits of full copyright access and participation to every segment of society, does the Copyright Clause permit, indeed does it require affirmative legislative and judicial action to redress pertinent social inequities and other problems of copyright social injustice?


17 U.S.C. § 117(a), (c), (d) (1998). Because of the language used in the statute, it is unclear whether the provision is limited solely to RAM copies created in connection with the provision of maintenance service, or extends to all instances of non-volitional RAM copying.
As discussed in the next section, the Constitutional Copyright Clause can indeed be reasonably interpreted to require a measure of copyright social justice in the fulfillment of its social utility mandate. Moreover, Digital Entrepreneurship stratagems and similarly socially responsive copyright strategies can be especially beneficial in shaping policies and initiatives for attaining this goal in the digital information age.

PART II. ACHIEVING INTELLECTUAL PROPERTY EMPOWERMENT AND SOCIAL JUSTICE THROUGH THE COPYRIGHT LAW: CONSTITUTIONAL MANDATES FOR COPYRIGHT SOCIAL JUSTICE

A. Uncovering Social Justice Imperatives in the Copyright Social Utility Mandate

Although Article I, Section 8 explicitly mandates that the copyright law serve to “promote the progress of the arts” and thus act as a mechanism for the social engineering and advancement of American culture, the Constitution does not specify all that compliance with this edict must entail. The Constitutional Framers wisely penned a broad directive of social utility, one amenable to legislative and judicial interpretation and application, as well as adaptation to the changing realities and mores of an evolving national culture. The fact that the Constitution requires that the copyright law perform a function of social utility, however, does not automatically mean that it also work as an engine for social justice.\(^\text{52}\) While the constitutional mandate assures the broad dissemination and

\(^{52}\) While the terms “social utility” and “social justice” defy concrete definition, they might at least be distinguished by characterizing mechanisms of social utility as bringing about useful, pragmatic social benefits to society, such as an increase in creative output, and characterizing mechanisms for social justice as effectuating pervasive fairness and equity. 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, 564 (2007) (“Social justice, after all, is generally taken to require significant obligations towards the poor.”). While these categorizations of social utility and social justice often overlap, they can also diverge; specific legal rules and social policies might benefit the greater good, however, ignoring any resulting disproportionate negative impact upon discreet minorities or disenfranchised segments of society raises questions of social justice; Mary W. S. Wong, Toward An Alternative Normative Framework for Copyright: From Private Property to Human Rights, 26 CARDOZO ARTS & ENT. L.J. 775, 830 (2009) (“Many . . . scholars share the belief that the current international IP regime does not adequately accommodate concerns of distributive social justice, and the relatively simplistic utilitarian balancing act it currently espouses tends to favor IP producers (who are located primarily in developed, mostly Western, countries). It does not easily allow for non-economic developmental considerations that are emphasized by human rights jurisprudence and norms, and that are socially beneficial objectives that IP regimes ought to incorporate. Alongside specific proposals for addressing these inadequacies, [these] scholars . . . support (either explicitly or implicitly) a broader approach that incorporates social and cultural theory, and that more clearly maps to less utilitarian objectives such as self-actualization, freedom of choice, and human development.”). See, e.g., Carla D. Pratt, Way To Represent: The Role of Black Lawyers in Contemporary American Democracy, 77 FORDHAM L. REV. 1409, 1410 n.1 (2009) (“[I]n a participatory model of democracy . . . all citizens have equal opportunity for full and active participation in not only government institutions, but also in non-
use of copyrighted works, it is unclear whether it also guarantees that everyone will actually enjoy equal access to the fruits and benefits of the copyright regime. Whether the Constitutional grant of power in the Intellectual Property Clause contains within it a requirement that the copyright law also achieve social equity and fairness within the copyright infrastructure is a separate question.

Some legal scholars and commentators have questioned whether the copyright law can truly be said to fulfill its function of social utility if in advancing the societal culture, it fails to also achieve an adequate measure of social justice. Does a civilization genuinely advance when significant segments of its populace remain bereft of the benefits of societal progress and achievements? Indeed, the advent of digital information technology, and the concomitant

governmental institutions such as corporations, schools, and unions. Under this broad view of democracy, equality means not just political equality for citizens, but social equality as well. While our democratic project has enacted laws aimed at extending legal citizenship as rights, it has not been as effective at extending citizenship as public participation to racial minorities, particularly blacks.

Constitutional Equal Protection of course does not require equal access to all of the benefits of a modern society. See, e.g., Sharona Hoffman, Preparing for Disaster: Protecting the Most Vulnerable in Emergencies, 42 U.C. DAVIS L. REV. 1491, 1516–19 (2009); see generally Christopher R. Green, The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application, 19 GEO. MASON U. CIV. RTS. L.J. 219 (2009). In theory, the state makes copyright protection equally available to all citizens, and at least as a matter of the law, everyone has the same opportunity to enjoy the works produced as a result. K.J. Greene, Copyright, Culture & Black Music: A Legacy of Unequal Protection, 21 HASTINGS COMM. & ENT. L.J. 339, 340–41 (1999) [hereinafter A Legacy of Unequal Protection]. The Intellectual Property Clause does not guarantee, however, that everyone will actually be able to afford the price of copies these works, any more than it guarantees that everyone will have the same opportunity to be educated by these works or the freedom to express any creative ideas that such works might stimulate. Some of these rights may be guaranteed by other provisions of the Constitution, but arguments that they are compelled by the Intellectual Property clause can be difficult to articulate. See, e.g., Julie E. Cohen, Copyright and the Perfect Curve, 53 VAND. L. REV. 1799, 1801–08 (2000); John P. Conley & Christopher S. Yoo, Nonrivalry and Price Discrimination in Copyright Economics, 157 U. PA. L. REV. 1801, 1802–28 (2009); Douglas L. Rogers, Increasing Access to Knowledge Through Fair Use — Analyzing The Google Litigation to Unleash Developing Countries, 10 TUL. J. TECH. & INTELL. PROP. 110–14 (2007); Sara K. Stadler, Copyright as Trade Regulation, 155 U. PA. L. REV. 899, 913–16 (2007).

growth in diurnal importance of copyrighted works and other forms of intellectual property have rendered the question more real than theoretical. The proliferation of digital technology has made comprehensive access to the store of copyrighted works a routine aspect of modern life for some, and if these resources are also placed within the reach of the poor and technologically marginalized, universal copyright access could become an immediate reality. Viewed from this perspective, regardless of the independent social justice breadth of the Intellectual Property Clause, the Constitution as a whole, adopted and ordained to form a more perfect union and to “secure Justice” and “promote the General Welfare,” arguably requires affirmative action in the cause of copyright social justice.

55 See Chander & Sunder, supra note 52, at 565 (“The Internet — through its various applications, from the World Wide Web and e-mail to peer-to-peer file sharing — enables anyone to share the stuff of intellectual property, the intellectual products themselves, relatively cheaply and widely. This radical change in the technology for disseminating intellectual products fosters hope for the most widespread use of human knowledge. Borges’s infinite library becomes almost conceivable, though it is not clear whether its midwife will be Google or a coalition of libraries.”).

56 June M. Besek, Anti-Circumvention Laws and Copyright: A Report From the Kernochan Center for Law, Media and the Arts, 27 COLUM. J.L. & ARTS 385, 391 (2004); Garon, supra note 18, at 1335–36 (“Scholars have described the Internet as ‘a unique and wholly new medium of worldwide human communication.’ The Internet can facilitate an ever expanding range of information flow and entertainment activities that include passive listening and viewing of music, film, and audiovisual works, interactive gaming, instant messaging, file sharing, collaborative authoring, and a host of other activities . . . . Digital storage and transmission also allow for virtually perfect reproduction of [material converted into digital formats], with the ability to copy and transmit each file having essentially no reproduction cost . . . . The format of the digital file results in a conflation of ideas, information, and the copyrighted expression, as the ‘computer file’ becomes the unitary metaphor for all three attributes of the work.”); Peter S. Menell, Envisioning Copyright Law’s Digital Future, 46 N.Y.L. SCH. L. REV. 63, 66 (2002); Neil Weinstock Netanel, Impose a Commercial Use Levy to Allow Free Peer-to-Peer File Sharing, 17 HARV. J.L. & TECH. 1, 3 (2004) (“P2P file sharing is not just downloading music and movies for free. It is a vehicle for finding works that are otherwise not available, discovering new genres, making personalized compilations, and posting creative remixes, sequels, and modifications of popular works. By engaging in such activities, people who might previously have been passive consumers now assert a more active, self-defining role in the enjoyment, use, and creation of cultural expression.”); Dan Thu Thi Phan, Will Fair Use Function on the Internet?, 98 COLUM. L. REV. 169, 191–93 (1998).


58 Chander & Sunder, supra note 52, at 578 (“No human domain should be immune from the claims of social justice. Intellectual property, like property law, structures social relations and has profound social effects.”); Charles H. Norchi, The Legal Architecture of Nation-Building: An Introduction, 60 ME. L. REV. 281, 290 (2008) (“Ensuring the human dignity of the beneficiary population is one of the foundational justifications for nation-building projects. As a practical matter, this is also a precondition for progress on any other reconstruction front.”).
While resort to the ecumenical provisions of the Constitution is certainly a viable means through which to construct an affirmative mandate for copyright social justice, it may not be necessary to search beyond the Intellectual Property Clause to identify an analytical foundation upon which the beachhead for copyright social justice can be established. It is also possible, perhaps even preferable to assess the objectives of copyright social utility and salient issues of copyright social injustice for interdependent themes and resolutions. The copyright law exists to further an enunciated social purpose, and much the same as when technological developments disrupt the copyright status quo and threaten to frustrate that purpose, where problems of copyright social injustice and inequity similarly impede copyright utility, affirmative legislative and judicial action is warranted. Consequently, evaluating problems of copyright social injustice for their impact on copyright social utility can reveal a theory of copyright social justice firmly rooted in the Intellectual Property Clause itself.

B. Copyright Social Utility/Social Justice Interdependence

Identifying interdependent issues of copyright social utility and social justice is not as difficult as it might initially seem. In many instances, it merely requires an appreciation for the ultimate social utility ramifications of copyright social injustice, and/or an intellectual sensitivity toward the copyright social justice benefits that naturally flow from mechanisms of copyright social utility.

For example, the tragic history of African American and other marginalized members of society being systematically defrauded out of the commercial profits derived from their creative genius, is widely lamented as a quintessential example of social injustice within the intellectual property regime. Often una-

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59 See, e.g., Danielle Conway-Jones, Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Co-modification of Culture, 48 HOW. L.J. 737 (2005); Copynorms, supra note 54; Jamar, supra note 5; McDonald, supra note 1; Intellectual Property and Social Justice, supra note 54; Simone A. Rose, On Purple Pills, Stem Cells, and Other Market Failures: A Case for a Limited Compulsory Licensing Scheme for Patent Property, 48 HOW. L.J. 579 (2005).

60 See Aoki, supra note 54, at 740–41 (“[T]he American patent system encouraged a more diverse composition of inventors through broadened access to opportunities for inventing, exploiting, and deriving income from inventive activity. However, because of the historical realities of race and slavery, the extent of this beneficial distributive impact on black inventors was illusory at best . . . . The early American patent system beckoned many poor white inventors to achieve wealth and recognition through a quasi-egalitarian patent system that facilitated investment in their lucrative ideas. The same opportunities did not await black inventors, whose contributions white society tended to ignore when the commercial value of a black invention was uncertain. In cases where commercial promise was more readily apparent, black inventions were subject to appropriation without attribution. State laws governing property and contract expressly precluded slaves from applying for or holding property. Presumably, this proscription included slaves being precluded from owning patents.”); Copynorms, supra note 54, at 1180–81 (“The institutional music industry has resorted to copyright infringement lawsuits to stem massive Internet piracy in recent years . . . . [T]he ‘copynorms’ rhetoric the entertainment industry espouses shows particular
ware of the opportunities and protections afforded by the intellectual property law, and sometimes simply lacking the legal or economic resources to secure and enforce their rights, these artists and innovators saw their rightful rewards misappropriated by white artists, publishers, entrepreneurs, and promoters, and sometimes even academics and scholars, all of whom had access to the financial and racial capital essential to commercial development and exploitation of artistic and innovative works.61

In the commercial entertainment industry alone, it is probably impossible to tally, much less make reparation in connection with the billions of dollars that African American and other marginalized artists and entertainers have been robbed of through the unauthorized and inequitable exploitation of their aesthetic genius, and the concomitant manipulation of the copyright law.62 From the annals of Jazz to tap to Rock and Roll, many of the actual originators of some of America’s most significant art forms languished in poverty and perished in obscurity, while their white imitators enjoyed fame, riches, and unearned places in history.63

irony in light of its long history of piracy of the works of African-American artists, such as blues artists and composers. For many generations, black artists as a class were denied the fruits of intellectual property protection — credit, copyright royalties and fair compensation. Institutional discrimination teamed with intellectual property and contract law resulted in the widespread under-protection of black artistic creativity. Similarly, black inventors created technical and scientific works that impacted early American industries. Evidence exists that black inventors also faced similar divestiture in the industrial marketplace. The mass appropriation of the work of black artists and inventors reflects the systemic subordination based on race that characterized most of U.S. history.”); A Legacy of Unequal Protection, supra note 53, at 357–58.


62 Copynorms, supra note 54, at 1183–84 (“Black artists did not share rewards commiserate with their enormous creativity. From an economic perspective, black artists sustained losses through deprivation of copyright protection that would constitute a massive sum.”); 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, 381 (2008) [hereinafter Lady Sings the Blues]; Kartha, supra note 61, at 234.

63 NELSON GEORGE, THE DEATH OF RHYTHM ‘N’ BLUES 108 (1988) (“Blacks Create and then move on. Whites document and then recycle. In the history of popular music these truths are self-evident.”); Copynorms supra note 54, at 1184–85, 1188–89 (“In the context of cultural production, Ellisonian invisibility is concrete in all its bitter irony. In the face of prolific and innovative Black musical creativity, ‘Whites [in the 1920s] often vehemently denied that African Americans had made any contribution to the creation of jazz. New Orleans “Dixieland” musicians . . . made it a point of honor never to mix with Black musicians or acknowledge their talents.’ In later years,
While this ignoble travesty implicates the copyright law, it also bespeaks of pervasive pathologies of American legal and social injustice. After all, the poor and disenfranchised are often socially and economically victimized and exploited, and otherwise deprived of equal protection under the law. Arguably, correcting such injustice where the subject res consists of copyrights is no more within the substantive province of the copyright law than preventing land fraud swindles is within the substantive province of the real property law. While the problem of “copyright bait and switch” certainly warrants legal redress, an important threshold question is whether such redress can be analytically rooted in the copyright law.

Although it typically proves counterproductive to contort laws intended to regulate specific areas of endeavor to redress generally undesirable behavior, there are some such situations in which adjustment to the pertinent laws of narrow scope is appropriate. Where structural gaps in the law facilitate particular socially undesirable behavior, or where clever charlatans devise methods to undermine the purpose of the law, albeit without technically violating its express terms, reinterpretation or even modification of the law’s provisions may be necessary to preserve its purpose. Thus for example, notwithstanding

it was widely conceded that ‘though African-Americans had certainly invented ragtime and jazz, these musical styles were being brought to their highest levels by [White] outsiders.” (quoting BURTON W. PERETTI, JAZZ IN AMERICAN CULTURE 42–43 (1993)); Kartha, supra note 61, at 232–34 (“The compulsory license made it possible for white artists to shanghai the African-American songbook. Pat Boonc was notorious for covering Little Richard's music, and eventually, songs “by niggers for niggers" realized a catalog value as great as those of Tin Pan Alley tunesmiths. Another unfortunate reality was that the Black songwriters and performers did not always understand the value of publishing rights which ended up being owned by white record companies. A great deal of revenue was generated by white groups covering Black hits . . . . Eric Clapton is an excellent example of an artist who reached long term fame using a lot of unoriginal music and styles taken from Black artists . . . . When he was with John Mayall's Bluesbreakers he recorded (blues artist) Freddie King’s “Hideaway,” Otis Rush and Willie Dixon’s “All Your Love,” Robert Johnson’s “Ramblin’ On My Mind,” and later, with the rock group Cream, he recorded “Crossroads," another Robert Johnson song. When he was with Derek and the Dominos he recorded Willie Dixon's “Evil,” Elmore James’s “The Sky Is Crying,” and later in his solo career he imitated reggae music. He recorded some music in Jamaica (not including “I Shot the Sheriff") where he recorded Peter Tosh's “Whatcha Gonna Do.” How would Eric Clapton's career fare a “total concept and feel” analysis like that set forth in Roth Greeting Cards v. United Card Co.?".

64 See, e.g., Daniel Benoliel, Copyright Distributive Injustice, 10 YALE J.L. & TECH. 45 (2007).

65 Copynorms, supra note 54, at 1217 (“The legal regimes of IP and contract, situated in a matrix hostile to both Black cultural production and to Black economic autonomy, failed to protect the interests of Black creative artists on a grand scale . . . .”); Kartha, supra note 61.

66 See JAN AYRES, PERVERSIVE PREJUDICE? 140–44 (2001); Copynorms, supra note 54, at 1194–95 (“Many of the defining features of contract theory, including the notion of freedom of contract, the objective theory of contract formation, the doctrine of adequacy of consideration and traditional hostility to undoing bargains absent fraud or duress, facilitated the subordination of Black artists. An unregulated system of contract disadvantages those with the least access to power and information in society. The unacknowledged gorilla in the room, racial stratification, rendered contract protection illusory to a large class of Black creators.”); Lateef Mtima, African-American
the sacrosanct principal of freedom of contract endemic to the American legal ethos, every state in the Union has adopted a Statute of Frauds provision, which mandates that agreements to transfer interests in real property be expressed in writing if they are to be legally enforceable. The stability of legal title to real property is a socio-legal objective of substantive contract and real property law that is considered too important to leave vulnerable to the general threats of witness perjury and imperfect memories. Where generic misdeeds and social shortcomings uniquely undermine specific socio-legal objectives, the relevant substantive law can and should be adapted to meet such cognizable threats to the law’s ambition.

Economic Empowerment Strategies for the New Millennium: Revisiting the Washington-Du Bois Dialectic, 42 HOW. L.J. 391, 409 (1999) [hereinafter Empowerment Strategies] (“The problem [of contemporary racial discrimination] is the efficacy of anti-discrimination laws and policies conceived principally in an era of overt racism, which efficacy is somewhat diluted in an era of covert, sometimes reflexive discrimination. Since today’s discriminator never says, and indeed, probably rarely even thinks the word ‘nigger,’ legal and social constructs attuned to such behavior are rendered impotent, unless indicia such as disproportionate impact are afforded appropriate consideration as colorable evidence sufficient to support (at least) an inference of discriminatory effect.”); Jennifer B. Wiggins, Torts, Race, and the Value of Injury, 49 HOW. L.J. 99, 101 (2005) (“Examining inequality in the law . . . requires more than knowing whether clear exclusions operated to blatantly fense out groups of people . . . [D]ecentralized, informal practices engaged in by individual actors within the legal system, for example, have resulted in a discriminatory structure and discriminatory outcomes when aggregated.”).


68 Ayres, supra note 66, at 140–41 (“The 1960s civil rights legislation outlawed discrimination in those markets — most notably housing and employment — in which the seller’s disparate treatment was open and notorious. But the absence of a manifest benchmark does not imply the absence of discrimination; there is no reason to think that animus or statistical causes of discrimination manifest themselves only in markets in which interracial comparisons of treatment can be readily made. Indeed, as various overt forms of discrimination have become illegal, more subtle and covert manifestations have replace them . . . . The existence of disparate racial treatment [evidence] is not only important in and of itself . . . . but also provides an opening wedge to justify a fundamental expansion of the domain of our civil rights law.”); Copynorms, supra note 54, at 1182 (“A pillar of all IP is the provision of ‘limited property rights in intangible products of investments, intellect and/or labor.’ Until recently, IP scholarship focused on doctrine and theory that did not include an examination of social and cultural subordination and inequity. However, IP scholars are increasingly recognizing that the legal regimes of intellectual property are inextricably linked to systems of social and economic inequality.”) Norchi, supra note 58, at 295–96 (“Thinking and working below the state means not confusing legal systems with legal rules. In any community, rules rest on the surface of the legal system. The real dimensions of the system are often found in other places. This is especially apparent in traditional villages where customary and formalized councils are both engaged in choice-making, in dividing up the weal and woe of
The social engineering aspirations which underlie American copyright law were of sufficient importance to the Framers that they provided for their satisfaction in the very first Article of the Constitution. Included among those goals is a system for author incentives, intended to help fuel artistic output.\(^6^9\) It would seem important that these goals are not frustrated by self-serving reprobates who would derail the copyright incentive function in favor of personal gain.

When the author incentive function is so widely corrupted that authors from significant segments of the population are systematically deprived of their copyright property rights and incentives, it is not only a problem of copyright social injustice, it also constitutes an assault upon the function of copyright social utility.\(^7^0\) Creative authors who do not benefit from the copyright regime

\(^6^9\) See, e.g., Jonathan S. Lawson, Eight Million Performances Later, Still Not a Dime: Why it is Time to Comprehensively Protect Sound Recording Public Performances, 81 Notre Dame L. Rev. 693, 701 (2006) (“Congressional extension of copyright protection to types of works and rights effectively confers a limited monopoly right upon authors, which often motivates authors to create more works, thus benefiting society through diversity of choice. The Founding Fathers envisioned this benefit to society and granted Congress, through Article I, Section 8, the ability to provide an author a temporary monopoly over his work, which would increase the total number of works and thus promote the “Progress of Science and useful Arts.”); Scott L. Bach, Note, Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law, 14 Hofstra L. Rev. 379, 396–97 (1986) (“The framers of the Constitution concluded that the most effective way to encourage creative expression is to give exclusive rights to authors for a period of limited duration. Such rights, however, are not Constitutionally guaranteed, but are created in Congress's discretion.”) (footnotes omitted).

have little incentive to participate in it. When marginalized groups and communities have no expectation of reward from copyright protection, their members lose the institutional incentive to produce artistic works. While some of these artists will of course find other incentives to create, many of these artists will lack the copyright incentive toward fixation, given the ultimately impotent protection that fixation may seem to offer. Why undertake to record your creative output if recordation provides you little or no benefit, and indeed, may even make it easier for those who enjoy the full franchise to misappropriate your creations? Nonetheless, whereas fixation might hold little appeal for some disenfranchised creators, it remains vital to the broad distribution of copyrighted works and other copyright social utility objectives.

In addition to the hazard of “fixation disincentive,” the systemic copyright disenfranchisement of marginalized authors can also engender conditions of “artistic xenophobia.” Some marginalized artists are likely to become wary of sharing their works with the general public, fearful of losing control over their creations or the commercial profits their works might generate. While some of these artists might sustain their creative output, they might nonetheless restrict public access to their work, a particularly pernicious result in the digital age of Internet dissemination and exchange.

Finally, putting aside the direct impact upon copyright social utility, there is the basic question of protection of fundamental rights. In the post-Civil Rights Era, American society has acknowledged that certain fundamental rights and liberties must be guaranteed as a matter of fact as well as a matter of law. Given that the mechanism of exclusive rights is one explicitly provided for in the Constitution as a means through which Congress is empowered to pursue an important social engineering objective, it would seem that systemic vitiation and

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71 See Aoki, supra note 54, at 760–61.

72 Nimmer & Nimmer, supra note 2, at Sec. 102; Saadi, supra note 1, at 347 (“[W]hen a performer obtains the right to use a rock & roll composition, he has by default also obtained the right to impersonate those aspects of the original performance which contributed at least as much as the underlying composition to the success of the original recording. In effect, Congress has created a disincentive to creativity by refusing to recognize a recording artist’s role in musical creation. Why should a recording artist be eager to create new recordings when he has no legal recourse against the financial harms imposed by imitators?”).


74 See Caroline Mala Corbin, The First Amendment Right Against Compelled Listening, 89 B.U. L. Rev. 939, 957 (2009); Green, supra note 53, at 289–90; Hoffman, supra note 53, at 1498; Norchi, supra note 58, at 289 (“Nation-builders drafting constitutional texts and codified laws must sift through both the myth system and the operational code in order to determine which processes of community decisions are both authoritative and controlling. A newly drafted constitution may be a myth while what people actually do in informal settings is the accepted code of operation.”).
misappropriation of this mechanism demands both careful judicial scrutiny and affirmative Congressional action.\(^7\)

When an initiative intended to further copyright social utility fortuitously ameliorates conditions of copyright social injustice, it is generally accepted as serendipitous. In a similar fashion, in specifically seeking a remedy for a problem of copyright social injustice, opportunities through which to preserve and even augment copyright social utility can be revealed.\(^7\)

Curtailing institutionalized manipulations of the copyright law which effectively disenfranchise minorities and the poor from its ambit, obviously furthers the cause of copyright social justice and intellectual property empowerment. But an even cursory analysis of the problem illustrates how its correction is also vital to the Constitutional mandate of copyright social utility. Ensuring that a fair portion of the proceeds from the exploitation of copyrighted works will inure to the authors who create these works, particularly authors who

\(^7\) See Jamar, supra note 5, at 629 (arguing that equitable access to intellectual property is essential in the digital information age and has thus should be accorded fundamental rights status); Wong, supra note 52, at 809–14 (exploring copyrights as fundamental human rights); Ayres, supra note 66, at 140–41.

\(^7\) See Aoki, supra note 54, at 800 (“In order to address exploitation, expanded IP rights may help, but at the expense of extinguishing vibrant, communal cultural production. A key question is whether it is possible for expanded IP rights and vibrant, communal cultural production to coexist or whether the former makes the latter impossible. A syncretic legal sensibility that attempts to dialogue with and engage preexisting difference and inequality related to that difference, instead of subsuming alternate modes of cultural production, is crucial when approaching these issues.”); Chander & Sunder, supra note 52, at 574 (“We... argue here that the view of intellectual property as serving only to incentivize more information production is too narrow. We offer a set of arguments for an expansive understanding of the values motivating and structuring intellectual property law. [For example spurring different kinds of innovation. Even if we are interested solely in spurring innovation, are we disinterested entirely in what kind of innovation we are spurring? Does it matter if the intellectual property regime fails to incentivize the creation of treatments for poor people’s diseases? While some might prefer official technological neutrality, governments often are keen to spur more socially useful inventions.”); Chon, supra note 54, at 2831–32 (“Intellectual property, when it encounters development either domestically or globally, must incorporate a more comprehensive understanding of social welfare maximization. . . . The overall assessment of intellectual property’s instrumental goal — the promotion of “Progress,” at least in the U.S. context — has been dominated of late by the assumption that pure wealth or utility-maximization serves adequately to evaluate social welfare. . . . This approach dovetails with the interests of intellectual property industries, whose short term goals of maximizing revenue generation are not necessarily aligned with society’s long term dynamic goals of maximizing innovation. . . . Over-reliance on utility-maximization ignores distributional consequences.”); Wong, supra note 52, at 842 (“By moving away from a view of copyright premised on the ownership of private property to one that focuses on access rights . . . within a human rights context, we shift our collective policy mindset away from the restraints of private property consequences (i.e., the right to exclude) toward one that is more open to considerations relating directly to [access to knowledge] and development. This will facilitate a larger role for social and cultural norms and values in determining the scope of copyright, not simply as an instrumental means of achieving market efficiencies and providing related economic incentives, but more broadly as a society’s manifestation of how it balances different and potentially conflicting individual/societal and economic/socio-cultural demands, needs and interests, in the name of overall development.”).
are members of marginalized and underserved groups, supports copyright social utility, in so far as it reinforces the intended function of the authors’ exclusive property rights and encourages faith and participation in the copyright system.77

Where it can be shown that persistent or widespread social injustice directly impedes fulfillment of the Constitutional directive to promote literary and artistic endeavor, remedial legislative and judicial action is appropriate to ensure that the objectives of the Copyright Clause are satisfied.78 Evaluating issues of copyright injustice through the lens of copyright social utility/social justice interdependence illuminates legal resolutions that serve these twin progeny of the copyright social engineering mandate. Moreover, a copyright social utility/social justice interdependence methodology promotes intellectual property empowerment and related social advances, and can be particularly useful in addressing these issues in the digital information age.

C. Copyright Social Utility/Social Justice Interdependence in the Digital Age: the Digital Performance Right in Sound Recordings Act

Sensitivity toward copyright social utility/social justice interdependence can be especially valuable in the digital information technology context, given this technology’s unique attributes for enhanced use of copyrighted material and related copyright social utility benefits. This is sometimes evident in the incorporation of digital information technology into the copyright regime with respect to the affect upon the traditional allocations of uses of copyrighted material as between authors and the public.

For example, the advent of digital information technology was at least partially responsible for the reexamination of the historical treatment of performing artists under the Copyright Act.79 For decades, performing artists oc-

77 See Peter K. Yu, The Copyright Divide, 25 CARDOZO L. REV. 331, 402 (2003) (“Copyright Law has always been about stakeholders. In the late nineteenth century, Anthony Trollope blamed American book piracy on ‘the book selling leviathans.’ A century later, Professor Jessica Litman told us that ‘the only way that copyright laws get passed in this country is for all of the lawyers who represent the current stakeholders to get together and has out all of the details among themselves.’ Since then, commentators have discussed at length the gaps between the ‘copyright-rich’ and copyright poor and between the haves and have-nots in the copyright system . . . . Today, a copyright divide exists between those who have stakes in the existing copyright regime and those who do not. On one side of the divide are the stakeholders, who are eager to protect what they have under the existing regime . . . . On the other side of the divide are the nonstakeholders. These nonstakeholders neither understand nor believe in the copyright system . . . . Unless the nonstakeholders understand why copyright needs to be protected and until they become stakeholders or potential stakeholders, they will not be eager to abide by copyright laws or consent to stronger copyright protection.”). As discussed in Part III, copyright social utility/social justice interdependence can therefore provide the doctrinal basis for affirmative initiatives, such as a copyright unconscionability doctrine tailored to the underlying social objectives of the copyright law.

78 Intellectual Property and Social Justice, supra note 54, at 576.

79 Untangling the Web, supra note 8, at 675 (“The crisis in the music industry has been brought about only in part by the digital revolution. The layering of copyright ownership interests and the complexity of copyright law, particularly as it applies to music, has played a major role in
cupied a copyright status inferior to that of lyricists and composers with respect to the Act’s recognition of an exclusive public performance right in sound recordings: See supra note 69 (“In the early 1960s, Barry Mann, Cynthia Weil, and Phil Spector composed the lyrics and music for the song You’ve Lost That Lovin’ Feelin’, which the Righteous Brothers originally recorded in 1964. Forty years and over eight million public performances of the sound recording later, You’ve Lost That Lovin’ Feelin’ became the most played song of all time on American radio and television. Despite the Righteous Brothers’ signature sound largely driving the long-term popularity of Lovin’ Feelin’, the duo has never received a single royalty check for any of the eight million nondigital transmissions. Mann, Weil, and Spector, however, have earned royalties for each of the eight million radio, television, and motion picture public performances.”); Saadi, supra note 1, at 338–39 (“[I]n spite of Congress’s refusal to recognize any natural rights foundation for copyright law, Congress has implied that the most valuable part musical creativity is the creation of musical compositions, not the creation of sound recordings. Furthermore, because the goal of copyright law is to promote the proliferation of the arts by granting a monopoly to artists for a limited time, Congress has determined that original renditions of musical compositions do not enhance or contribute to the artistic wealth of society in denying this monopoly to sound recording artists.”).

81 See June Chung, The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music’s New Form of Distribution, 39 Ariz. L. Rev. 1361, 1362–63 (1997) (“The Copyright Act differentiated between musical compositions and sound recordings. It only granted copyright protection for performance rights to the former. This meant that the right to prohibit any unlicensed public performance was held by the copyright owner of the underlying musical composition, but that the copyright owner of the sound recording did not have such a right. These two owners are not always the same person. The copyright in the musical composition exists to protect the composer’s notes and lyrics. On the other hand, a sound recording is the result of combining the musical, spoken, and other sounds onto a disc or other format. Without copyright protection for the sound recording, the performer’s actual recorded sounds of a piece of music are not protected. Unfortunately, this left the owners of sound recordings with no legal recourse if they encountered a copyright infringement of their works. Therefore, each time a song was broadcast on the radio, the owner of the musical composition received royalty payments while the owner of the actual sound recording had no right to receive any financial compensation.”); Saadi, supra note 1, at 334–35 (“Two types of battles often erupt over sound recordings and the rights that lie therein. One battle pits a recording artist’s desire for protection — the same kind of protection accorded to composers — against a blatant plagiarist’s theft. The other battle pits a recording artist’s insistence upon artistic integrity against a businessman’s greed. In either case . . . the recording artist has little legal recourse; American copyright law and related concepts of intellectual property law clearly favor the composer over the recording artist, and business over artistic integrity. . . . Our system seems to value the creative act of writing a song much more than it appreciates the creative acts involved in recording a performance of that song.”).

82 Chung, supra note 81, at 1363 (“Great debate arose after the passage of Copyright Act because the issue of a performance right in sound recordings was not addressed. Since 1976, Congress had considered and rejected legislation to grant such a right on three separate occasions.
This state of affairs seems particularly counterintuitive in light of the fact that most contemporary radio listeners tend to tune in to hear their favorite versions of musical works as recorded by particular performers, and not merely to hear musical works performed by indiscriminate artists.\footnote{See, e.g., Saadi, supra note 1, at 346–47 (“Unfortunately, against the backdrop of modern popular music such as jazz and rock & roll, the present copyright system grossly oversimplifies the relative roles of composer and performer. Modern music is more improvisational, and thus gives the creativity of the performer free reign. Furthermore, in popular music, a written score’s description of the musical makeup of a song is limited because it is incapable of fully capturing the essence of modern musical forms. The vocal intonations of an Elvis Presley defines modern music at least as much as the written score of Leiber and Stoller.”). Indeed, it is not uncommon for a particular musical work to languish until recording by the “right” artist. Even especially well known works can obtain new commercial and artistic vitality when reinterpreted and recorded by a talented performing artist. Kara M. Wolke, Some Catching Up to Do: How the United States, In Refusing to Fully Sign On to the WPPT’s Public Performance Right in Sound Recordings, Fell Behind the Protections of Artists’ Rights Recognized Elsewhere in this Increasingly Global Music Community, 7 Vand. J. Ent. L. & Prac. 411, 414 (2005) (“Music adds creative value to society, and as such, is a copyrightable commodity. The challenge to establishing a sound recording performance right is to agree that recording artists contribute equally with songwriters to that creation of value. Before lawmakers will agree that performers and producers are creative authors of a useful art, constitutionally deserving of copyright protection in the form of a general performance right equal to that afforded composers and songwriters, the deeply-rooted theoretical belief that performing artists and producers are less valuable to the creative process must be overcome.”).} A particularly poignant example of performing-artist-inspired interest in a musical work is the rendition of the Star Spangled Banner recorded by R&B recording legend Marvin Gaye. Obviously the National Anthem was already well known to every American when Gaye recorded it in 1984, but his unique interpretation of the song sparked a popular interest in the work which had not been evident for some time.\footnote{Marvin Gaye, The Master: 1961–1984 (Motown 1995). See Lawson, supra note 69, at 694–95 (“In a variation of the Righteous Brothers’ situation, members of the same musical group may also earn different royalties from public performances of sound recordings. Paul Simon and Art Garfunkel comprised one of the 1960’s most popular folk-rock duos, culminating in their ten-week chart-topping album Bridge over Troubled Water. While Simon solely wrote the vast majority of the duo’s material, undoubtedly each member’s distinctive voice and personality also contributed to Simon and Garfunkel’s success, with most in the music industry agreeing that Garfunkel’s high tenor was integral for recording their most popular songs. Despite Garfunkel’s significant contribution to the duo’s long-term success, he has no copyright protection (thus no right to demand royalties) in the public performances of Simon and Garfunkel sound recordings. Simon, on the other hand, composed most of the duo’s songs, entitling him to copyright protection (thus possibly receiving royalties) for all public performances of those musical works.”).}
A few scholars and commentators recognized the lack of a performing artist’s public performance right in sound recordings as a problem of copyright social injustice, some emphasizing its disproportionate impact on African Americans and other marginalized groups. Prior to the Civil Rights Era, a performance credit was often the only copyright acknowledgement that many African American musical artists received. This was often the case even where the African American performer was also an author, because many white promoters and agents took advantage of the fact that many African American artists were illiterate, unable to read or write music, or simply bereft of socio-legal bargaining power, and therefore substituted themselves as the authors of the creation of music than they are in 1997. This is not to say that the London Symphony Orchestra and the Boston Pops do not impart their own creativity to the performance and recording of classical compositions such as Beethoven’s Fifth Symphony — they clearly do. Nevertheless, it is difficult to dispute that the vast majority of the creative energy and the musical expression in classical works lies in the written score, where music is meticulously described. Thus, the copyright system once accurately reflected composers’ and performers’ respective roles in the creation of music, but has grown outdated in its prejudice against performers and recording artists of the present.”).

See, e.g., Lawson, supra note 69, 713–14 (“While a broadcaster transmitting a recently released Eminem song may drive Eminem’s record sales, the same cannot be said for older albums because the exposure value diminishes over time. For instance, oldies stations continue to play songs that have little, if any, current sales, and thus the artists of older works receive little, if any, exposure value from the public performances of their sound recordings. However, the song is nonetheless valued by the audiences that listen to, and the radio stations that prosper from, the song’s performance.”); Saadi, supra note 1, at 338–39 (“Congress reasoned that section 114 would permit multiple renditions of a composition to be recorded and distributed, and performance royalties paid to the composer and publisher (but not the recording artist) would thereby be increased. Congress’s desire to reward songwriters but not recording artists with performance royalties implies that there is little valuable artistry to be found in the recording process, and that the act of musical creation does not extend beyond composition. This logic disregards the significance of the recording artist’s talent, style, and interpretation of a musical score. It denies the performer his right to be recognized as an artistically important part of the creation of music; it treats the recording artist as if he were merely a computer or player-piano, translating notes contained on sheet music into audible form, imparting no feeling of his own into his performance.”); Wolke, supra note 83, at 412–13 (“From the largest record companies down to the newest performer recording their first album, a full public performance right in sound recordings is necessary to achieve legal, economic, and artistic equality for American performers and producers both at home and abroad . . . . While owners of musical works enjoy exclusive performance rights, the U.S. Copyright Act has historically denied equal rights to sound recording copyright owners. These inequities are important because at some point in most performers’ careers, their ability to generate income from touring, merchandising, and record sales will decline, and except for the digital performance right discussed earlier, the performer’s income stream will dry up. Meanwhile, a composer continues to collect royalties every time a song he or she wrote is performed publicly.”).

Copynorms, supra note 54, at 1189–90; Kartha, supra note 61, at 232.

Jeffrey Melnick, Tin Pan Alley and the Black-Jewish Nation, in American Popular Music: New Approaches to the Twentieth Century 34 (Rachel Rubin & Jeffrey Melnick eds., 2001). The identity of the artist performing on a recording is not easy to obscure. Of course, the racial identity of black performers was often hidden to make the recording more marketable. See A Legacy of Unequal Protection, supra note 53, at 380–83.
the artist’s work. The fact that members of minority and other marginalized groups and classes were often denied the status of writer or composer and were instead relegated to the category of performing artist likely contributed to the disparate treatment of these copyright constituencies under the Copyright Act.

This inequitable state of affairs remained unchanged for decades until the proliferation of digital information technology triggered an unexpected evolution in the law. In the 1990s, members of the recording industry became fearful that digital information technology would promote unauthorized copying of digitally broadcast music and thereby undermine sales of music recordings. Consequently, they lobbied Congress to pass laws to offset this result by providing for a royalty in connection with the public digital transmission of copyrighted recordings. In 1995, Congress responded by adopting the Digital Performance Right in Sound Recordings Act, through which performing artists

88 Copynorms, supra note 54, at 1189–90. “Black artists were segregated into ‘race record’ divisions of major record companies, and subjected to particularly onerous contracts . . . . Many early blues artists were poor and illiterate: the Blues ‘was created not just by black people but by the poorest, most marginal black people . . . [most of whom] . . . could neither read nor write.’” Id. (quoting Robert Palmer, Deep Blues: A Musical and Cultural History of the Mississippi Delta 17 (1981)) (footnotes omitted). Even when these artists did receive author credit, white promoters and agents would often add themselves as co-authors, notwithstanding the fact that they had no creative involvement in writing or composing the material. Id. at 1193. In many cases in which African American artists were not involved in writing or composing a work, they were specifically recruited to provide R&B interpretations and other commercially viable stylizations for the material. Id. Ironically, some of these situations involved a layer of gender discrimination. For example, some female songwriters such as the legendary Carole King were not considered commercially viable as performers and thus denied the opportunity to record their own material. See Lady Sings the Blues, supra note 62, at 381. Thus, a white male promoter or agent could combine the artistic talents of blacks and women and effectively determine the copyright status of all of the creative contributors, without making any copyright contribution of his own. Aoki, supra note 54 at 755–56; A Legacy of Unequal Protection, supra note 53, at 343, 358.

89 Copynorms, supra note 54, at 1183 (“The treatment of black artists provides a wealth of insight into core IP values, including incentive theory, optimal standards for creativity, and IP as mechanism for distributive justice. Moreover, the treatment of black artists, much like that of women, exposes the hidden context of subordination in the IP arena. The appropriation of the creative output of black creators for a long period of U.S. history parallels the pervasive subordination of blacks generally under the color of law. Racial discrimination has produced unequal access to capital, education, land and other entitlements under slavery and Jim Crow segregation. Copyright law exists within social structures that historically did not serve the interests of black cultural production.” (footnote omitted)).

90 Nimmer & Nimmer, supra note 2, at § 8B.01[C]; Chung, supra note 81, at 1384. “One early step taken by Congress in dealing with the issue of copyright infringement was in another musical realm: the Audio Home Recording Act. It was enacted to deal with new technology, such as DAT recorders. The Audio Home Recording Act states that ‘[i]n no action may be brought under this title alleging infringement of copyright . . . based on the noncommercial use by a consumer of (a digital audio recording device) for making digital musical recordings.’ The Audio Home Recording Act instead set off a portion of the revenues from the sale of such recording devices as royalty for the recording industry’s musical composition copyright holder, thereby avoiding the issue of liability.” Id. (quoting 17 U.S.C. § 1008 (1994)) (footnotes omitted).
finally obtained a property right in connection with the public performance of their recordings.92

By all accounts, Congress was motivated to adopt the Digital Performance Right in Sound Recordings Act primarily because of concerns for copyright social utility — specifically, the need to adapt author/performing artist compensation incentives to the new realities of the digital information age.93 However, while Congress may not have had a conscious social justice intent motivating its action, the Digital Performance Right in Sound Recordings Act nonetheless also enhances copyright social justice by correcting a copyright inequity, which also disproportionately impacted certain marginalized groups.94 Of course, had Congress perceived the problem primarily as one of copyright social injustice and adopted the Digital Performance Right in Sound Recordings Act on that basis, the propitious effect upon copyright social utility (i.e., the preservation of author/artist incentives) would have been the same. Sensitivity toward copyright social utility/social justice interdependence can therefore illuminate multiple bases for (and additional constituencies affected by) specific remedial copyright action and better assure that such action addresses the full range of pertinent needs and issues.

92 See Chung, supra note 81, at 1361 (“President Clinton signed into law the Digital Performance Right in Sound Recordings Act of 1995 (‘Digital Performance Right Act’), which became effective in January of 1996. This is the first law to grant a performance right in sound recordings and to specifically address digital transmissions, which include cable networks as well as computer transmissions.” (footnotes omitted)); Untangling the Web, supra note 8, at 687–88; Wolke, supra note 83, at 412.

93 See Chung, supra note 81, at 1365 (“The purpose behind the Act is two-fold. First, it will work with the existing Copyright Act to provide added protection against copyright infringement of digital music, specifically sound recordings. Second, it anticipates the possibility of a shift in distribution of sound recordings from physical to digital. As an example of this second purpose, the Senate Report to the Act commented on the fact that on-line services that allow subscribers to download music ‘on demand’ pose the greatest threat to traditional sales of records and compact discs. Since the copyright owners of sound recordings held the right to traditional sales prior to the Digital Performance Right Act, it was only fair to provide comparable rights for negotiating licenses for distribution of their copyrighted sound recordings over on-line services.” (footnotes omitted)); Untangling the Web, supra note 8, at 673 (“The music industry is in crisis. Infringe- ment is rampant, with little sign of abating. Despite lawsuits against peer-to-peer file sharing systems, new systems arise faster than old ones are shut down. Consumers are ripping and burning CDs with little regard for music copyright.” (footnotes omitted)).

94 Moreover, some commentators have pointed to the potential for even greater social justice benefits to argue in favor of full public performance rights, including some form of moral rights, for sound recordings. See Lawson, supra note 69, at 714 (“A right of public performance could possibly entail more than merely a right to receive royalties. For instance, an artist may wish that his song not be played on certain types of radio stations, in certain geographic areas, or in sleazy strip clubs; and, with a right of public performance, a performer could prevent disgraceful groups, such as the Ku Klux Klan, from adopting the performer’s song as rally music. A public performance right could conceivably allow the artist to have more control over who publicly performs his song and when, which may be crucial in sculpting the artist’s public image.” (footnote omitted)).
It is doctrinally pragmatic to examine problems of copyright social injustice for their impact on copyright social utility. This approach does not artificially transmogrify generic problems of social welfare into copyright dilemmas, but rather, acknowledges that certain social deficiencies gnaw at the very foundations of copyright protection. In such cases, it is not only appropriate to envision the copyright law as a tool for social justice, it is constitutionally mandated that the law be applied to correct social inequity in deference to the demands of copyright social utility. Moreover, redressing these deficiencies through the copyright law assures institutional responses consonant with the specific social engineering function of the Copyright Clause.

In exploring the concept of copyright social utility/social justice interdependence, a solid Constitutional premise for achieving copyright social justice is identified, and thus a foundation for affirmative copyright social justice poli-

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95 See, e.g., Chon, supra note 54, at 2912 (“If the instrumental mandate of intellectual property law is truly to increase knowledge for positive purposes, then there must be fuller consideration of the provision of basic needs and other global public goods such as food security, education, and health care. Undernourished, diseased, dying, undereducated, or extremely impoverished populations are viewed by many as negative externalities both qualitatively and quantitatively more serious than the danger of under-incentivizing authors and inventors. The latter is the externality to which intellectual property law devotes its exclusive attention. This disjuncture over priorities has highlighted an increasingly untenable intellectual solipsism of the intellectual property policymaking framework, as intellectual property globalization encounters ethical concerns associated with development.”).

96 This approach should not be construed to preclude redress for copyright social injustice where the link to copyright social utility is tenuous. As acknowledged in Part II, Section A, cogent arguments can be made that equitable access to the benefits of the copyright law is an independently inherent aspect of the Copyright Clause, bolstered by other provisions of the Constitution. The theory of copyright social justice/social utility interdependence merely provides a direct connection to the express mandate to promote the progress of the literary arts.

97 See, e.g., A Legacy of Unequal Protection, supra note 53, at 355–57 (“Theoretically, copyright functions to protect the creative output of authors, regardless of external social factors such as race . . . . In practice, Blacks as a class received less protection for artistic musical works due to (1) inequalities of bargaining power, (2) the clash between the structural elements of copyright law and the oral predicate of Black culture, and (3) broad and pervasive social discrimination which both devalued Black contributions to the arts and created greater vulnerability to exploitation and appropriation of creative works.”); Schultz & van Gelder, supra note 70, at 79–80 (“Despite the many other problems of poor countries, the struggles of creators and creative businesses are worthy of attention . . . . [C]reative industries are a significant, but thus far largely unfulfilled, opportunity for less-developed countries. Where abundant creative talent exists but local circumstances are otherwise trying, creative industries may be one of the best bets for economic development. Creative sectors, particularly music, tend to rely less on sophisticated infrastructure or capital-intensive investment. Potential is particularly abundant in Africa, where musical creativity is rich, diverse, well loved, and constantly evolving while drawing on strong traditions. The development of a popular music industry thus represents low-hanging fruit for most African economies. For creative industries to prosper the legal and business environment must be supportive, but in this context, a supportive environment does not require massive, decades-long investment . . . . It would be [most] effective to concentrate on making the legal system, particularly copyright law, function more effectively and on removing obstacles from the paths of creators and entrepreneurs.”).
cies and stratagems is established. As explored in the next Part, the strategy of Digital Entrepreneurship, which at its core embraces the nexus between the social utility function of the copyright law and the achievement of social justice, is one that promotes intellectual property empowerment while preserving the social utility mandates of copyright protection.

PART III. DIGITAL ENTREPRENEURSHIP: A COPYRIGHT SOCIAL UTILITY/SOCIAL JUSTICE INTERDEPENDENCE STRATEGY FOR THE DIGITAL INFORMATION AGE

A. Copyright Social Utility/Social Justice Interdependence and Digital Information Technology

Digital information technology is the modern copyright commoditization/social utility conflict metaphor. On the one hand, the technology offers revolutionary copyright social utility benefits, including enhanced end-user access to and interaction with copyrighted material. Today, access to a personal computer is access to a growing global store of copyrighted and other creative works, from which one can find the inspiration to create new works, or which can be digitally cannibalized in the construction of new creative output.

98 See, e.g., Netanel, supra note 40, at 2 (“Commentators and courts have universally hailed the Internet as an abundantly fertile field for self-expression and debate. But this acclamation masks sharp disagreement over whether certain Internet activity should be lauded or deplored. A prime example is the unlicensed use of copyright-protected material. The explosion of sharing and remixing of popular songs and movies over Internet-based peer-to-peer (‘P2P’) networks like Napster, KaZaA, and Morpheus has evoked sharply discordant reactions. Some commentators embrace the collection, exchange, and transformation of existing works as part and parcel of the individual autonomy, self-expression, and creative collaboration for which we celebrate the Internet. Others denounce those activities as massive piracy of intellectual property. They fear that P2P file swapping poses a mortal threat to the copyright system that sustains authors, artists, and a multi-billion-dollar-a-year industry in the production and dissemination of creative expression.”).

99 See Fair Use for Computer Programs, supra note 10, at 102-03 (“[There is an] extraordinary array of electronic information tools now available . . . that permit users to experiment with the plastic nature of works in digital form. By plasticity, I mean the ease with which such works can be manipulated, transformed, and/or inserted into other works. Although many authors might prefer for their works to remain as fixed as they have traditionally been in printed form, the genie of plasticity cannot be pushed back into the bottle. Digital manipulation is here to stay, for the manipulability of digital data is one of the key advantages of the digital medium.”) (footnotes omitted); Lawrence Lessig, Creative Economies, 2006 Mich. St. L. Rev. 33, 37 (2006) (“This is digital creativity. This is digital remix . . . . Anybody with a $1,500 computer can take images and sounds from the culture around us and remix them together to express ideas and arguments more powerfully than anything any of us could write as text. This is remix with more than text, yet it is the literacy of a twenty-first century. It is what kids do with computers once they are finished hoarding all of the content that was ever produced in the history of man. When they grow bored with the hoarding, what do they do next? They find things to do with the content they’ve collected . . . . This is what they do. This is writing for them. It has extraordinary creative potential.”); Michael J. Madison, Social Software, Groups, And Governance, 2006 Mich. St. L. Rev. 153, 153 (2006) (“The ‘personal computing’ technology paradigm of the last twenty years has done much to expand the scope of individual agency in the context of law and policy. Computers help individuals to create and consume information at unprecedented scale and at unprecedented speed.”).
Moreover, the benefits to be had not only promote copyright social utility, but digital information technology holds the promise for unprecedented equitable participation in the copyright system for all members of society, providing new opportunities for previously marginalized groups to express themselves creatively and otherwise profit from participation in the copyright regime.100

At the same time, however, digital information technology presents a formidable challenge to traditional copyright compensation expectations. Because of the ease in which end-users of copyrighted works can engage in the unauthorized digital reproduction, distribution, and other uses of such material, “digital remix”101 opportunities pose a genuine threat to copyright holder property rights.102

Both copyright owners and copyright social activists offer solutions to the digital commoditization/social utility conundrum. Many copyright holders argue that there is no reason to upset the copyright status quo. As has always been the case, copyright holders remain more than willing to license the use of their works at whatever prices the market will support.103 There is a real disincentive for copyright holders to demand too high a price, because if the required license fee is so high that the licensee can’t recoup her investment through sub-

Okediji, supra note 54, at 108 (“[I]nformation technology has empowered ordinary users to become part of the creative process both by its interactive nature and the very architecture of the pennum of the information society, the Internet.”).

100  Intellectual Property and Social Justice, supra note 54, at 572 (“[T]he digital revolution and similar technological advances present unheralded opportunities though which to confront [intellectual property social inequity] from a socially redeeming vantage point . . . . [T]he new technologies can provide the apparatus through which to achieve a more equitable distribution of the benefits of creative endeavor. In order to attain these goals, however, it is necessary to reorient our construction and application of the intellectual property law toward the aspiration of social justice.”). For statistics on the Digital Divide, see NAT’L TELECOMMS. & INFO. ADMIN., FALLING THROUGH THE NET II: NEW DATA ON THE DIGITAL DIVIDE, available at http://www.ntia.doc.gov/ntiahome/net2/falling.html.


102 SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1261 (11th Cir. 2001) (“The Copyright Act promotes public access to knowledge because it provides an economic incentive for authors to publish books and disseminate ideas to the public.” (citation omitted)); Peter S. Menell, Can Our Current Conception of Copyright Law Survive in the Internet Age?, 46 N.Y.L. SCH. L. REV. 63, 99–102 (2002–2003) [hereinafter Survive in the Internet Age?]; Pollack, supra note 15, at 2445, 2446 (“Digitization of copyrighted materials permits instantaneous, simplified copying methods that produce nearly perfect copies of originals. These copies can be digitally delivered to thousands of Internet users. Decentralization and anonymity in cyberspace have allowed for the widespread dissemination of copyrighted materials without permission from their owners.”).

103 See generally Netanel, supra note 40, at 77.
sequent sales or re-licensing to end-users, she will simply forego the use and neither party will benefit.104

The problem with these arguments, however, is that immediate profit from the license at hand is not always the copyright holder’s priority. Proposed licensee uses might compete with pre-existing products and drive the copyright owner from a dominant position in the market.105 Even where the copyright holder is unopposed to licensing a new digital use, some infant markets take time to gain commercial momentum and could be significantly delayed or even abandoned if the start-up costs are commercially prohibitive.106 And of course, some digital uses have enormous creative or social significance but little or no commercial value; in such cases even a modest license fee could preclude an innovative or socially significant digital use of copyrighted material.107

104 See, e.g., Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of “Authorship” 1991 DUKE L.J. 455, 462 (1991) (“[A]lthough it is traditional to view copyright doctrine as a battle between the interests of copyright owners . . . and copyright users, in practice, those interests are remarkably congruent. Both sellers and buyers have a considerable stake in the maintenance of an orderly market with plentiful supplies of new works at reasonable prices.”).

105 See, e.g., Netanel, supra note 40, at 77–78 (“[C]opyright industries have repeatedly exhibited a path-dependent resistance to licensing or engaging in new technological methods of exploitation that might endanger their traditional profit centers. Indeed, they have a long history of seeking to reap monopoly rents through anticompetitive collusion, blocking new entrants, and paying off gatekeepers for consumer attention. In the multimedia and Internet contexts, copyright industries have also engaged in protracted cross-sectoral turf battles, leaving would-be licensees with the highly complex, costly task of seeking multiple, overlapping permissions. This institutional conservatism and balkanization does not inspire confidence that, if only given control, the industries would make their full store of cultural expression readily available at reasonable prices.”); Raymond T. Nimmer, Licensing in the Contemporary Information Economy, 8 WASH. U. J.L. & Pol’Y 99, 145 (2002) (“A person who controls information may elect not to distribute the information . . . . Unless mandatory disclosure laws govern, the law protects that decision.”); Travis, supra note 54, at 786–90.

106 Netanel, supra note 40, at 25–27; Travis, supra note 54, at 773–75, 794. See also Untangling the Web, supra note 8, at 698–99 (“Three significant problems are evident in the picture [of] the music industry. First, as a result of the dual layer of copyrights and the divided rights granted to each owner, there are too many vested industry players for downstream users to be able to efficiently obtain the authorizations needed for downstream use of recorded music. Second, the divisible yet overlapping rights granted to copyright owners leads to industry gridlock and problems with holdout behavior. Finally, the demands for payment from the downstream user by too many vested industry players, combined with industry consolidation, result in the price being too high to achieve the goal of copyright. In the words of economists, the music industry is full of market failures.”).

107 See, e.g., Netanel, supra note 40, at 79 (“Not surprisingly . . . copyright industries resist providing no-cost or reduced-price licenses for non-profit, non-commercial, and educational uses. Mid-level decision makers in copyright industry firms often apparently prefer to deny a low-price license outright — or simply to ignore such licensing requests — than to devote the time required for individualized treatment or to risk a supervisor’s wrath for having granted a discount from standard pricing. This resistance arises partly from the vagaries of decision making in a large organization. But it may also make perfect economic sense for the copyright industry firm; at some point the costs of setting and administering differential pricing outweigh the revenues the firm can expect to reap from such a regime.”); Travis, supra note 54, at 801–02.
Some proponents of copyright social utility argue that aggressive invocation and even expansion of the Fair Use Doctrine to circumvent copyright holder exclusive rights is the best way to preserve copyright social utility in the digital age. Digital reuse of copyrighted works is undeniably beneficial to the primary objective of the copyright law, the promotion of literary and artistic expression, and thus should be prioritized over property right/incentive objectives. While these arguments are not without appeal, this approach to the issue is equally problematic. First, there is the long term impact on the copyright incentive scheme and the potential of reducing artistic output. Second, erosion

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108 See generally Netanel, supra note 40, at 74–75 (“Some commentators contend that [unrestricted digital use] would greatly benefit all but entrenched copyright industries. They emphasize that our use of existing expression is a social good, whether seen in market terms as the satisfaction of consumer wants or in liberal democratic terms as an instance of personal liberty, self-definition, and self-expression. And they argue that the extension of copyright — and content providers’ technological control — into personal free use zones has no justification. Copyright, they posit, operates primarily to protect traditional content distributors — record labels, book publishers, and movie studios — far more than creators. That protection might have been warranted in the brick-and-mortar world, when content distribution required massive investments in money and labor. But peer-to-peer networks, they maintain, render middleman-content-distributors, and thus copyright, obsolete. In the digital universe, in fact, copyright serves as a vehicle for media conglomerates to entrench their market position and expressive power. The copyright industries have employed copyright infringement litigation to stifle peer-to-peer networks and dry up financing for new media enterprises that threaten industry dominance. Copyright also distorts our expressive universe by rewarding marketing muscle rather than spurring creation. Digital abandon, the commentators maintain, would beneficially undermine copyright industry entrenchment and distortion without unduly reducing incentives for authors.”). See also Okediji, supra note 54; Thi Phan, supra note 56; Travis, supra note 54.

109 See LAWRENCE LESSIG, THE FUTURE OF IDEAS 136 (2d ed. 2002) (“We have the potential to expand the reach of creativity to an extraordinary range of culture and commerce. Technology could enable a whole generation to [create] — remixed films, new forms of music, digital art, a new kind of storytelling, writing, a new technology for poetry, criticism, political activism — and then, through the infrastructure of the Internet, share that creativity with others. This is the art through which free culture is built.”).

110 See NIMMER & NIMMER, supra note 2, at 13; Alfred C. Yen, Restoring the Natural Law: Copyright As Labor and Possession, 51 OHIO ST. L.J. 517, 518 (1990) (“Copyright is necessary because in its absence those interested in using the author's work would simply copy the work instead of buying it from the author. Authors would then find their economic returns too small to justify the costs of authorship. In such a situation authors might not produce, and social welfare would presumably suffer. To remedy this problem, economic theory supports granting authors copyright in their works . . .”). Fair Use Standard, supra note 9, at 1107–08 (“Copyright is intended to increase and not to impede the harvest of knowledge . . . . The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors . . . . [The Constitution's grant of copyright power to Congress] '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 . . . . The monopoly created by copyright thus rewards the individual author in order to benefit the public.'” (citations omitted); Litman, supra note 18, at 43 (“This is the central justification for further enhancing the rights in the copyright bundle: without strong copyright protection, there will be no national information infrastructure. The public might believe that what it wants is unfettered access to copyrighted works in return for reasonable royalty payments to authors, but, if we let the public set the freight charges, we risk underproduction of freight. If authors and publishers cannot reliably control their works,
of copyright property rights could also undermine copyright social justice, by rendering the new generation of digital copyright authors, re-mixers, and entrepreneurs vulnerable to unjust exploitation in the future.\footnote{See Benoliel, supra note 64, at 50–51 (“Copyright law neither should be designed to promote the well-being of private parties or specific categories of people nor should it be connected to ends that advance a sectored societal goal or the creation of another market to explore. At times there may be a lack of understanding among fairness scholars of what, given the present constitutional copyright framework, distributive justice is most efficient in promoting. Any application of distributive justice ultimately is done at the expense of a given sector of the public and diminishes the size of the general market, against the purpose of copyright law. The general history of copyright law, and of the Copyright Clause of the Constitution in particular, clearly reveals that copyright exists for the benefit of the public welfare. Thus, its goal should not be to advance specific sectors of society or distinct markets.”); Locke Remixed, supra note 101, at 1262 (“I think remix culture has great potential. But I disagree about its implications for copyright. I do not think remix culture ought to force deep, fundamental, and permanent change in the structure of copyright law. First, I do not think such change is necessary; high enforcement costs and market competition will neutralize much of the potential for copyright law to bog down remix culture. Second, it would not be fair to the people who create original mass market content for remixers to ‘redistribute’ too much of the money creators earn from their work.”).} While subsequent artists may visualize the creative possibilities for the reuse of “remix,” it is likely that major copyright conglomerates will reap the ultimate commercial benefits from “relaxed” copyright protection in the digital context through mass production of remix works.\footnote{Noah Balch, The Grey Note, 24 REV. LITIG. 581, 607 (2005); Fredrich N. Lim, Grey Tuesday Leads to Blue Monday? Digital Sampling of Sound Recordings After the Grey Album, 2004 U. ILL. J.L. TECH. & POL’Y 369, 377–80 (2005).} In so far as African American and other marginalized authors and artists are concerned, this would merely begin the cycle of unjust exploitation anew.

The application of copyright social justice/social utility interdependence theories provides a more palatable solution to the digital commoditization/social utility copyright conundrum. This approach taps directly into the inherent features of digital information technology and emphasizes symbiotic mechanisms to promote both copyright social utility and social justice.\footnote{Peter Jaszi, Caught in the Net of Copyright, 75 OR. L. REV. 299, 300 (1996) (“‘Net user’s understanding of rights and duties, grounded as that understanding is in an ethic of information sharing . . . . Information is a special kind of property, one which — unlike a ball or a jacket —}
neurship is one such affirmative copyright social justice/social utility interdependence strategy, tailored specifically toward the demands of the digital information age.


Digital Entrepreneurship strategies are constructed to accomplish consciously that which the Digital Performance Right in Sound Recordings Act achieved fortuitously. Broadly defined, Digital Entrepreneurship involves the application of traditional entrepreneurial tenets and principles, which have long been utilized in the service of social uplift and advancement, to the cause of intellectual property empowerment in the digital context. Adapting these tenets and principles to the specific social utility/social justice function of the copyright law, Digital Entrepreneurship affirmatively seizes upon the copyright law as an instrument for social change.

Implementation of Digital Entrepreneurship begins with the development of a program of grassroots intellectual property legal activism and community pedagogy, including education as to the commercial potential of fixed

improves, rather than degrades, with use . . . . The understanding of rights in information which traditionally has characterized American copyright — one in which the public interest in reasonable access to information has been afforded as much weight, in balancing, as the private interest in control.

114 The term “Digital Entrepreneurship” was coined by Professor Michael Risch, the WEST VIRGINIA LAW REVIEW, and the Entrepreneurship, Innovation and Law Program in composing a descriptive title for the present Symposium. Given the theme and scope of the Symposium, an over-arching definition centered on the role of digital information technology in the creation of entrepreneurial opportunities in the field of intellectual property seems appropriate; it is by no means, however, the only legitimate or even viable definition for the term. A review of the articles published as part of this Symposium highlights other approaches to providing analytical parameters and a cohesive structure for the concept.

115 See Empowerment Strategies, supra note 66, at 409; Sherman Rogers, The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations, 48 HOW. L.J. 1, 9, 57–58 (2004) [hereinafter Black Quest] (“Historical data reveals African American entrepreneurial activity at the incipient stages of the nation’s development in the 1600s. One historian determined that a conservative estimate of the collective wealth of the nearly 500,000 free African Americans on the eve of the Civil War was approximately $ 50 million . . . . The sociology of entrepreneurship examines the tendency of ethnic minorities to engage in business enterprise because of their exclusion from positions of political influence and subordination to a group of rulers. It is the sociology of self-help through entrepreneurial activities. [Max] Weber observed that national or religious minorities who are in a position of subordination to the ruling class are likely to be driven into economic activity because of their exclusion from positions of political influence . . . . [Edna] Bonacich’s research . . . established that disfavored ethnic groups achieved economic security by playing the middleman position within the structure of capitalism. Middlemen occupations include positions such as labor contractors, rent collectors, money lenders, and brokers. As middlemen, they negotiate property transactions between producers and consumers, owners and renters, the elite and the masses, and employers and employees. Hostility to these ethnic minorities forces them to operate on the fringes of the economic system.”).
creative expression and the attendant significance of obtaining and enforcing comprehensive intellectual property protection for such work. Program design and instruction could be undertaken by practicing attorneys, law professors, and law students on a pro bono basis, and through collaboration with local civic, religious, and similar community leaders and institutions, these programs could successfully target marginalized and underserved groups and communities.\(^{116}\)

While most laypersons readily appreciate the entrepreneurial significance of acquiring a trade skill\(^{117}\) or opening a small business,\(^{118}\) few routinely

\(^{116}\) See, e.g., Christine Haight Farley, Peter Jaszi, Victoria Phillips, Joshua Sarnoff, & Ann Shalleck, Clinical Legal Education and the Public Interest in Intellectual Property Law, 52 ST. LOUIS U. L.J. 735, 736 (2008) (“Quizzical looks as to the existence of a public interest in IP and the power of clinical pedagogy propelled us to create an educational experience in which students could reflect on the meaning of the public interest within IP law and policy, while learning the complexities of being a lawyer . . . . [T]he 1990s saw a distinct acceleration in the trend toward ‘high-protectionism’ in copyright, patent, and trademark law, and [American University Washington College of Law] IP faculty members became increasingly involved in opposing that trend in the courts, Congress, and international bodies. So it seemed like a natural extension of our existing activities to create a clinic in which students could learn about the relationships among IP theories, policies, and practices, in particular those that implicate the public interest; developments in the statutory, regulatory, and doctrinal frameworks effecting momentous changes in IP law; the practices of IP lawyers; and the experiences of those who seek IP protection or who feel the legal regimes of IP impinging on their ability to engage in educational, creative, innovative, and culturally significant work.”). Copynorms, supra note 54, at 1179 (“Unlike employment or educational practices, the copyright system and discrimination in the arts, has never received the intense scrutiny of progressive attorneys seeking to combat and redress discrimination . . . . A society which subjected Blacks to many types of invidious discrimination was unquestionably affected when Blacks started to receive vigorous legal representation in the civil rights area. Similarly, it seems clear that had the Black blues, jazz, and rock/soul artists of past eras received honest and vigorous legal representation, the pattern of appropriation might have been stopped.”). In addition to outright IP clinic options, there are a number of IP Empowerment outreach programs designed to promote IP social justice initiatives such as community IP education and diversity in the IP legal profession. See, e.g., The Center for Intellectual Property, http://www.umuc.edu/distance/odell/cip/cip.shtml (last visited Oct. 18, 2009); The Center for Law and Innovation, http://www.lawandinnovation.org (last visited Oct. 18, 2009); The Institute for Intellectual Property & Social Justice, http://www.iipsj.org (last visited Oct. 18, 2009). Of course, the Internet generally provides a plethora of web based community IP education initiatives. See, e.g., ELECTRONIC FRONTIER FOUND., EFF Launches “Teaching Copyright” to Correct Entertainment Industry Misinformation, May 27, 2009, http://www.eff.org/archives/2009/05/27; NYMusicCopyright.org, A Copyright Resource for New York Musicians, http://nymusiccopyright.org (last visited Oct. 18, 2009).

\(^{117}\) Black Quest, supra note 115, at 63 (“The ‘real business group’ [in the segregated black communities] was the pool of about 3,000 black undertakers, making up nearly ten percent of all undertakers. [Gunar] Myrdal notes that black undertakers had a monopoly in this line of business because white undertakers did not want to touch the bodies of deceased blacks. This was especially true in the South. Black undertakers were successful, even though they never handled white funerals, because black people tended to spend lavishly on funerals irrespective of their economic plight. Black barbers, beauticians, and hairdressers tended to be successful for the same reasons; in 1930, there were 34,000 black entrepreneurs and employees in this line of work, constituting about ten percent of all such workers in the country.”).

\(^{118}\) Id. at 95–96 (“Black businesses, excluding insurance companies and banks, fell into four main categories by 1930: (1) amusement and recreational enterprises; (2) real estate businesses;
consider the development of intellectual property as a means toward socioeconomic uplift. Certainly there are scores of amateur artists who see their talent as an avenue to fame and fortune, but even they often fail to place sufficient emphasis on intellectual property ownership in their long-term plans. Of course, even the most legally savvy unknown will lack the bargaining leverage to secure especially favorable terms in connection with the mass production, marketing, and distribution of her creative output, much the same as any unproven entrepreneur seeking start-up capital investment. Nonetheless, equipped with at least a working knowledge of the applicable intellectual property rights and protections, and of the intellectual property commoditization system as a whole, the marginalized amateur creator can negotiate her initial agreements more effectively, or at least negotiate strategically with respect to future agreements, when her bargaining position is likely to have improved.

In addition to understanding the commoditization potential of intellectual property endeavor, marginalized creators and communities must be thoroughly apprised as to the unique role that digital information technology can

(3) retail trade enterprises; and (4) businesses providing personal services. The largest number of successful black enterprises were those providing personal services, ‘restaurants, beauty parlors, barber shops and funeral parlors.’ . . . . An overwhelming number of emerging black businesses which engage in providing some sort of personal service continue to be solely owned by the founder or his successor. In 1987, for example, sole proprietors owned 94.4% of all black firms. These figures are consistent with 1982 and 1977 statistics, which indicate that 95% and 94.3% of black-owned businesses were sole proprietorships in those years.”)


120 Black Quest, supra note 115, at 99–100, 110 (“[Seventy-five percent] of black entrepreneurs state that that they have encountered some discrimination in obtaining bank financing. In 1982, 69% of black owners started their businesses without borrowing money. It is estimated that the gap between the capital available to blacks and that which whites can employ is over $ 200 million and projected to grow at a rate of $ 13.8 million a year. . . . African Americans have always found it more difficult to obtain capital to start, maintain, and grow their business enterprises largely due to discrimination and social realities. This history of discrimination has forced African American entrepreneurs to rely on bootstrapping, the art of learning to do more with less, as a routine matter.”).

121 For example, in the recording industry, many a new recording artist will place undue emphasis on signing bonuses and other “upfront” payments, and fail to plan for the time when her popularity will wane (and the record company will be less likely to grant royalty advances or underwrite daily expenses). For many artists, this can be an extremely vulnerable moment in their careers, and lifetime royalty streams are often signed away for desperately needed lump-sum cash payments. I’ve advised new artists to negotiate for guaranteed multi-year salaries to be paid out of gross revenues throughout the term of the initial contract, in lieu of a signing bonus if necessary. Such terms can provide some future security, particularly when the “hit” releases are no longer coming and the parties are locked in long term struggles over accountings and the artist is without alternative sources of income.
play in the development of original copyrightable expression and in offering alternative commercialization mechanisms to those controlled by the creative distribution conglomerates. To be sure, in many cases, traditional corporate licensing opportunities will provide the best development and marketing options for an undiscovered creator; however, digital exposure can create the kind of public following that can trigger a corporate licensing proposition, enhance creator bargaining leverage, or provide confirmation as to a market and revenue base worthy of the pursuit an independent, entrepreneurial venture.

Equally important as education regarding the creation and protection of original copyrightable expression is knowledge of the public’s rights and privileges to use preexisting creative material, both with respect to material in the public domain as well as the Fair Use and/or de minimis use of material under copyright. Many members of marginalized communities (indeed, many Americans period) are unaware of their entitlement to these “free” resources,

122 See, e.g., Chung, supra note 81, at 1371–72 (“The Internet is potentially the way people will conduct commerce in the next century. Although Internet commerce is in its early stages, ‘some observers predict that the volume of commercial transactions on the Internet will rise to over $200 billion in the year 2000.’ . . . Also, there are new Web sites created daily. Web browsers, such as Netscape, makes it possible for consumers to find and retrieve information ‘in graphical, audio and video form.’ . . . Additionally, in regards to cassettes and compact discs, the costs of mass reproduction and transportation to traditional record stores will be eliminated since the consumer can download the music directly from the Web sites of various record companies.”); Matthew Fagin, Frank Pasquale, & Kim Weatherall, Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution, 8 B.U. J. SCI. & TECH. L. 451, 457–58 (2002); (“Digital technology has made the reproduction and dissemination of copyrighted works infinitely easier and almost costless. Each digital copy is identical, and is therefore capable of generating infinite further reproductions. Once networked, everyone is a potential ‘publisher’ — not only to a few friends, but to millions.”); Sharon Sandeen, In For A Calf . . . The Right of Anonymity/E-Commerce, 29 HASTINGS CONST. L.Q. 527, 534–36 (2002) (“On the Internet, it is also possible to launch online advertising with very little capital . . . . Once an Internet sales campaign is developed, the incremental costs to send solicitations to thousands, if not millions, of Internet users is marginal. . . . Unlike companies who purchase print, radio and television advertisements, if you choose to establish your own web site or engage in e-mail solicitations you can do so without paying someone else for the placement of your advertisements. . . . As with the expansion of the railroads, improvements to mail service, and the development of the telegraph and the telephone, the Internet has enabled the further decentralization of business and a corresponding increase in remote contracting. Remote contracting has existed for centuries, but the Internet makes it much easier for individuals and companies to purchase goods and services from businesses that are located around the world.”).

123 Ponte, supra note 81, at 63–64.

124 See Benoliel, supra note 64, at 59–60.


126 See, e.g., Robert Brauneis, Copyright and the World’s Most Popular Song, 56 J. COPYRIGHT SOC’Y U.S.A., No. 2–3, 335 (2009) (discussing the Byzantium copyright history of “Happy Birthday” and the fallacy of anecdotal beliefs that the song is in copyright and not in the public domain).
or are skeptical of its reminiscence to the promise of forty acres and a mule. Nonetheless, from the musical *Wicked* to the film *Clueless* to the disco hit *A Fifth of Beethoven*, public domain material has been successfully exploited on a grade scale by those who are aware of its availability. Not only are members of marginalized communities equally entitled to profit from this bounty, but there is a sense of social gratification to be had in providing the descendants of victims of copyright injustice the opportunity to sip from the cup of communal creative works in the cause of their own socio-economic advancement.

Finally, in addition to the exploitation of the public domain and the legally sanctioned use of works in copyright, there is the matter of creative entrepreneurial use of protected material without the imprimatur of the copyright public use rights and privileges. There are cogent arguments to the affect that in light of past injustices, it is only fair that members of marginalized groups be allowed wide latitude in connection with the unauthorized use of copyrighted works. There is much merit to this position. As a pervasive intellectual property empowerment strategy, however, the efficacy of such an approach is limited.

For one thing, the courts continue to hold firm that unauthorized digital use of copyrighted material, even in the absence of commercial exploitation, will be punished as copyright infringement. Perhaps more to the point, such weakening of copyright property rights may not be in the long term interests of the budding generation of digital entrepreneurs. Traditional entrepreneurial tenets contemplate long term as well as immediate socio-economic advance through the development, ownership, and commercial exploitation of individual resources. In the context of Digital Entrepreneurship, this necessarily entails preservation of the copyright entrepreneur’s traditional exclusive rights. Copyright social activists should therefore be wary of “digital free use” initiatives, given the American tradition of majority imitation of minority innovation. As many an African American rap artist has begun to appreciate, she who samples

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127 These highly successful adaptations were of course based on Frank L. Baum’s *The Wizard of Oz*, Jane Austin’s *Emma*, and Beethoven’s *Fifth Symphony*, well after these classic works had passed into the public domain.
129 See Anyanwu, supra note 61, at 198–99 (arguing that rap music sampling serves an educational function in the dissemination of African American culture and thus should be allowed under the Fair Use Doctrine as an educational use); *Copynorms*, supra note 54, at 1217 (“If the music industry is serious in its rhetoric about "theft" of IP, it should atone for the theft it itself has facilitated. The entertainment industry is arguably the prime beneficiary of special interest intellectual property legislation that seeks compensation for even trivial uses of intellectual property.”).
131 *Black Quest*, supra note 115, at 21–24, 45–46.
132 See supra Part II.B.
today shall herself be sampled tomorrow. Lest digital information technology be molded into a means for the repetition of past institutionalized injustice, wholesale digital free use/reuse amendments to copyright property rights should be eschewed.

In sum, Digital Entrepreneurship strategies can promote copyright social utility and social justice by way of the existing regime and not in defiance of it. Indeed, not only can lawyers, policy makers, and social activists play a critical role in furthering this agenda, but courts should consider these factors in pertinent Fair Use cases. Creative albeit unauthorized entrepreneurial use of copyrighted material which inures to the benefit of copyright social utility/social justice interdependence, especially where it results in culturally unique creative expression, may well qualify as transformative use, and thus a Digital Entre-

133 Bridgeport Music, Inc., 383 F.3d at 401.

134 Locke Remixed, supra note 101, at 1269–70. (“[T]he romantic narrative of [remix] rebellion is only one of the stories we need to tell. There are others at least as important, and, on the numbers, quite pervasive. This is the workaday story of people trying to make a living at what they love to do. Not faceless bureaucrats at Walt Disney or Sony Records, but real-live musicians and songwriters, novelists and film industry workers, people who actually send the kids off to school and go to work ‘making content.’ They may work in groups large or small, designing, sketching, brainstorming; or they sit down in their kitchen or small studio and try to write a new song, or edit a script, or lay out a website, as a way to make a living. This narrative — call it ‘trying to make a go of life in the digital media industries’ — is no less compelling than the romantic story of resistance and rebellion. But it is a story not told often enough (in my view) in the pages of academic journals, or even the popular press.”).

135 See, e.g., Schultz & van Gelder, supra note 70, at 81–82 (“We advocate specific, pragmatic reforms that could remove obstacles to using copyright to benefit local creative industries. Most discussions about intellectual property and development tend to center on high-level, somewhat abstract debates about technology transfer, relations between rich and poor countries, the fairness of the international intellectual property system, and concerns about distributive justice. The policy initiatives that get the most attention occur at the level of international institutions like the World Intellectual Property Organization (WIPO) and the World Health Organization (WHO). Whatever the merits of these debates, they do not focus on making the most of the available local resources and the laws that countries already have. One would do well to focus also on specific reforms that could use copyright and creative industries to help poor people by removing obstacles at the local level. A virtue of this bottom-up approach is that resource-constrained policymakers need not embrace broad, expensive solutions. Nor is success contingent on the presence of an advanced technological, physical, educational, or financial infrastructure. Indeed, we contend that government can best support creative sectors primarily by providing a stable legal foundation and business environment. This role in fostering an enabling environment is crucial, but creators and creative industries can and must do most of the work. Ultimately, success will come from unleashing the genius and initiative of individuals. The focus on grass-roots solutions is in keeping with much recent thinking on development, which calls for more context-specific, results-oriented, entrepreneurial projects that empower locals.”); see also Birgitte Andersen, Zeljka Kozul-Wright & Richard Kozul-Wright, Copyrights, Competition, and Development: The Case of the Music Industry, U. N. Conf. on Trade and Dev., Discussion Paper No. 145, 2 (2000), available at http://www.unctad.org/en/docs/dp _145.en.pdf.

136 See Campbell, 510 U.S. at 579; Rogers, 960 F.2d at 309 (“The first factor ... asks whether the [work was used] in good faith to benefit the public or primarily for the commercial interests of the infringer.”); Cynthia M. Ho, Attacking the Copyright Evildoers in Cyberspace, 55 SMU L. REV. 1561, 1573 (2002) (“The legal nuances attendant to fair uses in teaching and research are far
entrepreneurialism bent on Fair Use could support a socially significant but otherwise limited intrusion upon the commercial market for a copyrighted work.\textsuperscript{137} Properly embraced by the bench and bar, Digital Entrepreneurship analyses and strategies can help to harvest the full copyright social utility/social justice potential of digital information technology.

C. Digital Entrepreneurship Legislation: A Flexible Digital Compulsory License Scheme

While affirmative adoption of Digital Entrepreneurship principles by attorneys and judges will promote the exploitation of digital information technology in the cause of copyright social utility and social justice, attorney activism and judicial sensitivity alone will not entirely resolve the digital copyright social utility/commoditization conflict. There remain many kinds of socially beneficial digital uses for copyrighted works that will require the copyright holder’s consent, and consequently, some reconciliation of the societal interest in maximizing copyright exploitation of digital information technology with the preservation of the exclusive rights incentive mechanism must be achieved. The balancing of the various constituent interests, however, must be undertaken with proper deference to copyright social utility/social justice interdependence, and with an eye toward attaining the pragmatic objectives of Digital Entrepreneurship.

There is a growing consensus among legal scholars and commentators that resolution of the digital copyright social utility/commoditization conflict warrants Congressional action,\textsuperscript{138} and various approaches to the problem have been offered.\textsuperscript{139} The congressional response that appears to have the broadest

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\textsuperscript{137} See, e.g., Suntrust Bank, 268 F.3d at 1270–72, 1274–75 (vacating an injunction enjoining a critical parody of Gone With the Wind, on the grounds that such a transformative use of the protected elements of a copyrighted work is permissible under the Fair Use Doctrine).

\textsuperscript{138} Garon, supra note 18, at 1326–27 (“Congress has the legislative authority to tip the balance in favor of copyright owners or towards the public on a case-by-case basis. Except for possible constitutional limitations, Congress can shape the balance across a wide spectrum of issues.”); Tasini and Its Progeny, supra note 3, at 404–05 (“In deciding which uses of copyrighted material should be relegated to the copyright holder as exclusive rights, Congress has the opportunity to consider a variety of factors, including the nature of each particular use and the effect that removing the use from the public enjoyment is likely to have on the underlying objectives of copyright law.”); Thornburg, supra note 18, at 237 (“Copyright law has always grappled with how to adjust to new mediums of expression. In both the courts and Congress, advances in recording, reproducing, and distributing copyrighted works have always led to tension in fashioning appropriate mechanisms to protect authors without creating an imbalance or unfavorable results.”).

\textsuperscript{139} See, e.g., Free(ing) Culture, supra note 101, at 96; Locke Remixed, supra note 101; Tasini and Its Progeny, supra note 3, at 404–05 (“The identification of any of exclusive rights simulated by or incorporated within a new use for copyrighted material is a reasonable method by which to

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following, however, is that of a compulsory license scheme. As discussed in Part I, a compulsory license typically offers the kind of compromise that can foster further innovation, and can provide a more efficient means by which to get copyrighted material in to the hands of grass roots creators, while preserving the property interests of copyright holders and the ensuing property interests of their licensees.

While a compulsory license system is preferable to a blanket “digital free use/reuse” easement, it must be carefully tailored if it is to achieve the broadest range of copyright social utility/social justice objectives. The greatest challenge of course is in setting the compulsory license rate: if the rate is set too high, it could prove a barrier to many socially productive but commercially unprofitable uses; if it is set too low, it could compromise the interests of individual artists, particularly marginalized artists, and just at the moment that digital information technology is making artist retention of their ownership and distribution rights viable.

In addition, digital use encompasses the entire spectrum of copyrightable expression, from printed literary works to cinematic visual works and everything in between. Given the myriad issues and interests at stake, the optimum compulsory license approach would therefore be one that provides for a flexible, advisory licensing rate, and that would take into account enumerated statutory

determine the appropriate author/exclusive rights versus public/free access classification for that new use. It is not, however, the only reasonable method. Another legitimate approach to the new-use classification problem is to consider the new use as sui generis — that is, as an activity unique and distinguishable from any existing uses, including any exclusive rights that may be simulated by or incorporated within the new use.”); Netanel, supra note 40.

140 See, e.g., Joshua Crum, The Day The (Digital) Music Dies: Bridgeport, Sampling Infringement, and a Proposed Middle Ground, 2008 B.Y.U. L. REV. 943, 947 (2008) (“[C]ompulsory license is by far the best solution to the growing problems concerning digital sampling for three reasons: 1) unlike other proposed solutions, a compulsory license preserves the benefits of the Bridgeport rule while mitigating its faults; 2) a compulsory sample license is consistent with the theories underlying copyright protection; and 3) only a compulsory sampling license fulfills the conflicting goals of copyright’’); Kartha, supra note 61, at 239–41; Free(ing) Culture, supra note 101; Tasini and Its Progeny, supra note 3, at 414, n.153; Srivastava, supra note 40, at 467–68.


142 See Untangling the Web, supra note 8, at 700 (“Today . . . we have several different entities claiming an interest in any given [copyright] activity. Each of those entities backs its claim with reference to the Copyright Act and the full panoply of legal remedies available. If clearance from more than one entity is necessary, in addition to high transaction costs, the environment is ripe for strategic behavior and the potential for holdouts. This is particularly true when you have muddy rules masquerading as clear entitlements. Even in light of the mechanisms used to reduce those transaction costs (e.g., compulsory licensing and CROs), the lack of certainty concerning which right must be authorized creates the very real potential of consumption below the socially optimal level.”).
factors in assessing the appropriate license fee for a particular digital use.\textsuperscript{143} Three such factors are discussed below.

The first factor to be assessed would be the commercial, quasi-commercial, or non-commercial nature of the use and/or of the underlying copyrighted work, with commercial uses requiring the highest rate and non-commercial uses requiring the lowest. Similar to the transformation assessment available in connection with the first Fair Use factor, this assessment would also weigh the social importance of the use and of the underlying work. Thus for example, the use of a factual news report in a historical documentary would likely be considered a quasi-commercial use, even if both the news report and the documentary are produced for commercial distribution.\textsuperscript{144}

The second factor that would be assessed is the availability of suitable alternatives to the underlying work, as well as the significance of the portion of the underlying work being used, both with respect to the underlying work as well as with respect to the work in which it is being used. Where there are ample alternatives, a higher rate might be appropriate, because the selection of the underlying work is more likely to be motivated by the desire to capitalize upon specific expressive aspects of the work. Moreover, in such a situation the user has the option of choosing a lesser known alternative work, as to which the copyright holder is likely to be satisfied with a smaller license fee (and the opportunity to draw attention to her work). Where the underlying work is both unique and critical to the use, however, this would militate toward a lower license rate,

\textsuperscript{143} This approach is quite similar to the approach that has been used in connection with the compulsory mechanical license for musical works for decades. See, e.g., Untangling the Web, supra note 8, at 681–83 (“Currently codified in section 115 of the Copyright Act, the compulsory license allows recording artists to record what are commonly known in the industry as ‘covers’ — musical works written by someone else and previously released on an album by a different recording artist. This royalty is owed for each copy manufactured and distributed, regardless of whether the copy is sold or given away for free. Most creators of phonorecords, however, do not use the compulsory license mechanism to obtain permission to use musical works. In 1927 the National Music Publishers Company created the Harry Fox Agency, a wholly owned subsidiary, to issue and administer mechanical licenses. Harry Fox represents over 27,000 music publishers, who in turn represent the interests of more than 160,000 songwriters, who own more than 2.5 million copyrighted musical works. While the creators of most sound recordings do not utilize the statutory provisions for the compulsory mechanical license, the availability of such a license does affect the rate paid under a license granted by Harry Fox and the terms of the license. The parties to the licenses administered by Harry Fox are negotiating in the shadow of the compulsory license that both parties know could be used instead.”); see also Netanel, supra note 40, at 44 (proposing a similarly flexible levy on the sale of consumer products and services whose value are substantially enhanced by P2P file sharing).

\textsuperscript{144} As evident from Fair Use jurisprudence, not all commercial uses are equal; the mere fact that an unauthorized use can or does generate commercial revenue should not completely overshadow any significant social good that flows from the use. For purposes of assessing a digital compulsory license rate, commercial use with significant social value should be considered a quasi-commercial use entitled to a lower license rate. This compromise is consistent with both the Fair Use Doctrine and the intellectual property empowerment objectives of Digital Entrepreneurship.
to prevent exorbitant "holdouts," particularly where the use is of important social value.

The third factor that would be assessed would be the apparent applicability of public use doctrines such as Fair Use and de minimis use, as well as any pertinent authors’ rights doctrines such as moral rights.145 The availability of a compulsory license should not be used to curtail the public’s right to engage in use of copyrighted material at no cost. Only where there is reasonable doubt as to the applicability of a public right or privilege should the option of a minimal compulsory license fee be resorted to, in order to avoid litigation to resolve the dispute. Of course, where an unauthorized use of copyrighted material is clearly outside the realm of legitimate public use, the compulsory license mechanism should be invoked to enable the use.146

Finally, the compulsory license scheme should include an express unconscionability provision,147 which could be invoked by either party. In some cases, a party might demand an unreasonably high (or low) license rate, abusing the existence of the compulsory scale to gain unfair leverage. While the fact that the requested license rate falls within the parameters of the compulsory scale would carry a presumption of fairness, that presumption should be rebuttable. Even where one party is confident that a requested license rate is grossly unfair under the circumstances, it may be more expedient simply to capitulate to the demand. The presence of an express unconscionability provision (with an appropriate damage remedy) specifically tailored toward copyright social utility/social justice concerns would give negotiating parties reason to rethink unfair bargaining strategies, and also provide the courts with specific guidance for assessing the fairness of a license rate under the relevant circumstances.148

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146 Here again traditional copyright doctrines would be relevant in determining an appropriate license rate. The compulsory license should not be deployed as a means by which to undermine copyright property interests, for example, to enable the duplication and distribution of an entire work at a cost that will supplant the market for the original work. Such a use would not be permitted under the fourth factor of the Fair Doctrine. Moreover, to the extent that an unauthorized use conflicts with an artist’s moral rights under 17 U.S.C. § 106A, the compulsory license provision would be inapplicable.


148 Once again, this approach borrows from the process already in place for the mechanical compulsory license. See generally NIMMER & NIMMER, supra note 2, at 8.01[B][1]; Untangling the Web, supra note 8, at 685 (“The practice of pooling thousands of copyrighted musical works and then offering blanket licenses did not go unnoticed by the Antitrust Division of the U.S. Justice Department. Lawsuits asserting violations of antitrust laws led to consent decrees that remain in force today, governing aspects of both ASCAP and BMI licensing practices. One of the re-
CONCLUSION

The ongoing conflict between copyright digital social utility and digital copyright commoditization has engendered a reemphasis upon the social engineering obligations of the copyright law, and a search for copyright policies which will reconcile these contemporary copyright tensions. The recognition of copyright social utility/social justice interdependence harmonizes these competing objectives, by promoting more equitable access to the copyright infrastructure and correcting historical problems of copyright social injustice, while at the same time advancing copyright social utility by producing a more diverse pool of stakeholders in the copyright property rights sub-regime. Accordingly, the promulgation of Digital Entrepreneurship and similar copyright social utility/social justice interdependence initiatives that facilitate grassroots copyright participation and intellectual property empowerment will not only further the social justice agenda of the law, but will also preserve the author incentive function and enhance related copyright social utility mechanisms to accommodate the digital information age.