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## CREATIVITY AND CRAFT

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### I. Introduction

Consider objects, which I call things. It is widely acknowledged that things can be creative; they are made by creators. If that is true, then why can't things be copyrighted?<sup>1</sup> That puzzle and its implications are the subjects of this chapter.

The Supreme Court has confirmed that copyright law is designed to encourage the production and distribution of "creative" works of authorship, or "creativity," to use a common shorthand.<sup>2</sup> I take that premise as given. It is well known, nonetheless, that not all creativity is equally encouraged by copyright, even in light of what has become known as the law's "aesthetic nondiscrimination principle."<sup>3</sup> Creativity that neither differs in a minimally creative way from its source nor originates with the work's author cannot be protected by copyright.<sup>4</sup> "Facts" are arguably created by human agency yet cannot be protected by copyright.<sup>5</sup> "Ideas" that are wholly the product of creative human imagination cannot be the subject of copyright, though under some circumstances ideas may be patented; copyright protects original "expression."<sup>6</sup> Only creativity that is "fixed in a tangible medium of expression" can be the subject matter of copyright.<sup>7</sup> "Unfixed" creativity, such as the improvisations of a jazz performance, lies beyond the scope of statutory copyright and, since statutory copyright preempts equivalent state law,<sup>8</sup> may disappear from legal protection altogether. Copyright courts tell us that the law does not discriminate among creators and creativity. Yet all available evidence tells us that it does.<sup>9</sup>

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<sup>1</sup> I am taking some poetic license with this statement. Strictly speaking, "copyright" is a noun, rather than an adjective. One does not "copyright" a work of authorship, because copyright attaches to a work of authorship automatically, at the moment of its fixation in a tangible medium.

<sup>2</sup> See *Feist Publ'ns, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

<sup>3</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

<sup>4</sup> See *Feist Publ'ns, Inc.*, 499 U.S. at 344-47.

<sup>5</sup> *Id.*

<sup>6</sup> 17 U.S.C. § 102(b) (2006).

<sup>7</sup> 17 U.S.C. § 102(a) (2006).

<sup>8</sup> 17 U.S.C. § 301 (2006).

<sup>9</sup> See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenge of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1382 (1989); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998). The foregoing propositions are supported by citations to American copyright law, but in countries that belong to the Berne Convention, the law is substantially the same. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 102 Stat. 2853, 1161 U.N.T.S. 31, at art. 1, 2. As Joseph Miller has pointed out, it is recognized

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On the standard account of copyright, there are reasons for that discrimination, and those reasons make good sense. The dominant justification for copyright law is consequentialist, which means that copyright is subject to a variety of cost/benefit calculations as society determines, whether the law leads to the outcomes that society wants it to. Society stipulates to the benefit that copyright law is needed to encourage the production and distribution of creativity. Society also stipulates to certain offsetting costs. Access to material in copyright must be procured before it can be used in new forms of creativity, often at a price, which means that producing new works of authorship is more expensive than it would be if use of existing works were free. The scope of copyright should be calibrated to avoid imposing those costs if the benefits of creativity can be obtained otherwise, without the encouragement of copyright. Facts, ideas and unfixed creativity are, on one reading, examples of things that will be produced and distributed in adequate quantities even without the incentives of copyright, giving society the benefit of their existence without the costs associated with copyright protection. The doctrine of fair use is likewise understood as a mechanism to procure the benefits of new creative works without society enduring the costs of copyright.<sup>10</sup> Within that consequentialist framework, there is little to be gained by prejudging the benefits of “good” creativity and the harms of “bad” creativity; society is often reluctant to trust judges and legislators to judge what is “good” art and “bad” art.

Other sorts of discrimination within copyright make less sense, even within the consequentialist account. This chapter addresses one of those: the intersection of creativity, copyright and craft. By “craft” I mean the design and production of tangible objects, typically by hand or with hand tools and in contrast to mass production by machine or standardized labor. I include everything from works of fine art to custom-produced furniture to needlecrafts; I appreciate the fact that the term “craft” evokes a certain artisanal nostalgia, but “craft” in its broadest sense includes human-produced artifacts even if their tangible manifestations are digital or virtual. “Craft” is typically associated with the acquisition and application of knowledge and skill within some discipline or domain, in contrast to the personal “creativity” that is thought to characterize “art” and “expression.” I confine the term “craft” to physical things, or at least to material (including digital) things, rather than to the cognitive or imaginative processes that produce them.

Copyright law approaches craft works with a standard, historically well-grounded analytic move. Primarily through Section 202 of the American Copyright Act,<sup>11</sup> the copyright statute distinguishes the intangible “work of authorship” that is embedded in the craft work from the tangible object that one might hold in one’s palm. The former, the intangible, is governed by copyright, though scholars have noted that the law lacks any

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that the Berne Convention imposes a minimum requirement that only the works of authors may be protected by copyright, and works must be creative or original. As in American copyright law, the Berne Convention defines neither of these terms. See Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 486 n.179 (2009).

<sup>10</sup> 17 U.S.C. § 107 (2006); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>11</sup> 17 U.S.C. § 202 (2006).

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coherent definition of the concept of “the work.”<sup>12</sup> The latter, the tangible, is governed by rules applicable to chattel property, including contract and tort. Copyrightable creativity is the product of the mind, not of the hand.

Given that move, one might wonder why I suggest that the discrimination wrought by copyright law is difficult to comprehend; surely the law appropriately encourages and protects the creativity expressed in the intangible work of authorship that is embedded in a craft work, and new tangible objects are not the kinds of public goods that economists recognize in intangible creative works protected by copyright. Creators of craft works do not need copyright protection, because their works are not at risk for the kinds of misappropriation that imperils the creators of intangible works. Yet that is precisely the beginning of my claim. The tangible elements of craft works are themselves creative, and they are creative in ways and for the reasons that the consequentialist account of copyright could recognize but chooses not to. In this first place, I accept the basic validity of consequentialism in copyright.

The fact that copyright law chooses not to recognize craft-based creativity is interesting, and it is disappointing to craft-based creators, but it is hardly momentous. This chapter advances the further claim that the exclusion of craft-based creativity from copyright is based on ethical considerations as well as on consequentialist ones. What I characterize here as “ethical” interests are sometimes labeled elsewhere “labor-based” interests and “personality-based” interests,<sup>13</sup> that creators might claim legal entitlements in their creations by virtue of acts of creation themselves. This observation is at odds with the standard consequentialist account, which increasingly views ethical justifications for copyright as inapplicable or irrelevant to modern law.<sup>14</sup> Via the distinction between tangible objects and intangible works of authorship, the law affirmatively rejects ethical interests of creators. That rejection on ethical grounds not only impacts copyright’s ability to realize its consequentialist goals in a general sense (via protection of fewer than all creative works than copyright might protect) but also in a narrower, practical sense. The rejection of ethical arguments regarding craft works limits the range of possibilities that copyright doctrine might consider in the context of computer software copyright, software licensing, the doctrine of fair use, and rights applicable to derivative works.

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<sup>12</sup> See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575, 576 (2005).

<sup>13</sup> I do not mean to overstate the rejection of ethical justifications for copyright, even in American law. Wendy Gordon has argued that a harm-based conception of Locke’s labor-based theory of property has influenced and continues to influence copyright. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993).

<sup>14</sup> English and Continental traditions that recognize labor-based interests are gradually being assimilated to the dominant consequentialist approach. See Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 *J. COPYRIGHT SOC’Y (USA)* 949 (2002) (describing a global trend away from labor-based justifications for copyright, consistent with *Feist*). But see Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 *DEPAUL L. REV.* 1063 (2003) (noting that labor-based arguments remain viable in the United Kingdom and Australia, for example).

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The argument proceeds in the following modest steps. First, the chapter revives and reviews long-standing claims regarding the creativity inherent in craft and links those claims to contemporary arguments in copyright. If craft in tangible objects represents human creativity, and if the central purpose of copyright law is to encourage and promote creativity, then there is no good reason to exclude craft from copyright unless some exception to the general principle, akin to the exception that governs facts and ideas, applies to tangible objects. The chapter questions the soundness of a judgment that an exception is justified on consequentialist grounds alone. Ethical claims matter. Second, the chapter considers the ethical implications of craft as creativity. Philosophers as well as artists themselves have long argued that the products of the human hand are ethical in nature, because they link mind and body and in so doing express something fundamental about the nature of humanity.<sup>15</sup> What we make, in a sense, makes us. The chapter concludes that by excluding these works from the scope of copyright protection, the law takes an affirmative stance with respect to ethical interests in copyright law. Finally, the chapter concludes by drawing out some doctrinal and policy implications of copyright's ethical stance regarding craft works.

## II. Craft as Copyrightable Creativity

This section explores the proposition that craft works constitute creativity of the sort that copyright law ordinarily is expected to encourage. In this context, creativity in craft works consists precisely of the physicality of creative expression, the material forms of human activity that copyright law has distinguished for more than 200 years from the intangibles that are the ordinary objects of the law. Yet the propositions that craft constitutes creativity and that creativity is manifested in craft are intended to recapture a sense that is even older, one traceable at least to Aristotle. That ancient sense was challenged by mechanized production and reproduction during the 19th and 20th centuries and is often submerged entirely beneath contemporary digital technology. Yet it also seems to be re-emerging in recent popular writing.

### *Is Craft Creative?*

Is craft creative? Aristotle may have thought so. In the *Metaphysics*, Aristotle spoke of *making* (*poiesis*) rather than creativity, as we use the latter term today, in the sense that the production of new things – both tangible and conceptual – followed natural and rational laws rather than emerged from inspirational or mysterious processes;<sup>16</sup> the artist or artisan

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<sup>15</sup> This part of the argument should be distinguished from arguments that creativity has an important and inescapable spiritual dimension that should be recognized in copyright, see ROBERTA ROSENTHALL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2009), and from arguments that “art” in law and practice means more than what the artist wants it to mean, if it means anything at all. See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263 (2009).

<sup>16</sup> See Aristotle, *Creation as Making*, in *THE CREATIVITY QUESTION* (Albert Rothenberg & Carl R. Hausman eds., 1976), at 33; ARISTOTLE, *METAPHYSICS* (W.D. Ross trans., Clarendon Press 1924) (350 B.C.E.), at Book VII, Parts 7-9, in 8 *THE OXFORD TRANSLATION OF ARISTOTLE* 791-95 (W.D. Ross trans. & ed., 1928).

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was guided by skill (*technê*) that embodied the maker's knowledge of the idea or pattern to be achieved. One might suppose that ancient Greeks distinguished between the conceptual and the material in their understanding of making, but they did not. Making involved the production of new things from preexisting things, according to the maker's idea of the thing – the essential attributes – of that which the artist meant to produce. "Creativity" as we know that term and generally understand it today, as an act of imagination, was not part of the Aristotelian scheme. Making was not a matter of imagination or innovation; making involved the re-production (that is, the making anew) of existing, natural forms (*mimesis*).

Aristotle held no monopoly on how ancient Greeks viewed craft and art. Plato, of course, distinguished between the reality of ideal forms and objects in the world of the senses; suspicious of mimesis, as a process that interfered with the ability to distinguish forms from objects, he leaned toward the sense of (what we now call) creativity as inspiration.<sup>17</sup> Philosophers aside, artists in many fields, including poets, the original "makers," engaged in divine acts of creation, inspired by Muses, the daughters of Zeus.<sup>18</sup>

As Greece and ancient Rome passed into darkness and eventually the Renaissance, making beget creativity. During the Enlightenment and afterwards, acknowledgement of novelty and artistry lost its connection to the divine; what had been an uncertain line between the inspired and the man-made became an uncertain line between inspired (one might say "genius"-based or at times, madness-based) creativity, and "ordinary" craft.<sup>19</sup> What Aristotle teaches today is that the distinction between (intangible) art and (material) craft, and between the "created" and the merely "made," was originally far less sharp than it now appears.<sup>20</sup> Leading research today explores the cognitive basis of creativity,<sup>21</sup> but the presumption that creativity is primarily a cognitive phenomenon is just that – a presumption. There is a well-grounded tradition that traces creativity to material practice. To paraphrase the philosopher Hilary Putnam, creativity just ain't in the head.<sup>22</sup>

Twentieth-century philosophers and artists recognized the uncertainty in the distinction between material practice on the one hand, and imagination and creation on the other. Theorists in the phenomenological tradition, such as Heidegger,<sup>23</sup> and hermeneutics, such as Gadamer,<sup>24</sup> centered their philosophies on material practice and objects as we

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<sup>17</sup> See STEPHEN HALLIWELL, *ARISTOTLE'S POETICS* 82-92 (1998).

<sup>18</sup> The nine Muses addressed epic poetry, lyric poetry, sacred poetry and hymns, tragedy, comedy, music, dance, astronomy, and history.

<sup>19</sup> See Paul Oskar Kristeller, "Creativity" and "Tradition," 44 *J. HIST. IDEAS* 105 (1983).

<sup>20</sup> See HUGH HONOUR & JOHN FLEMING, *A WORLD HISTORY OF ART* 2-3 (7th ed. 2005).

<sup>21</sup> See, e.g., *THE NATURE OF CREATIVITY: CONTEMPORARY PSYCHOLOGICAL PERSPECTIVES* (Robert J. Sternberg ed., 1988) ; MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* (1996).

<sup>22</sup> Putnam's original statement was "Meanings just ain't in the head." Hilary Putnam, *The Meaning of "Meaning,"* in *LANGUAGE, MIND AND KNOWLEDGE* (Keith Gunderson ed., 1975).

<sup>23</sup> See MARTIN HEIDEGGER, *BEING AND TIME* 98-101 (John Macquarrie & Edward Robinson trans., 1962) (1927).

<sup>24</sup> See HANS-GEORG GADAMER, *TRUTH AND METHOD* 39, 102-10 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004).

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experience them, rather than solely on their meaning. Bronowski and Dewey, among others, applied the phenomenological perspective to creativity itself.<sup>25</sup> The common thread in this work is the insight that materiality expressed in things and in practice is a recursive source of, object of and instantiation of human experience, knowledge and imagination. The discipline that is implicit in craft, and craft works themselves, manifests creativity as doing, rather than creativity as thinking. In contemporary intellectual property scholarship, Julie Cohen has offered related arguments aimed at creativity and invention, arguing that the creativity that is the object of copyright law needs to be appreciated in social, cultural and material context.<sup>26</sup> Mario Biagioli has investigated the methods used by makers of new scientific instruments to protect their businesses and what he calls their “authorship.”<sup>27</sup> Artists and other creators still often identify craft with creativity,<sup>28</sup> even in the context of creativity and creative practice enabled by and reflected in the virtual but nonetheless material aspects of digital technology and computer software.<sup>29</sup> Their livelihood is in their hands as much as it is in their imaginations – in contrast to the early formulation of copyrightable originality offered by Justice Holmes, “the personal reaction of an individual upon nature.”<sup>30</sup>

Perhaps the best modern evidence for the proposition that society should not overlook the creativity of the material comes from 20th-century critiques of craft. The German critic Walter Benjamin queried the meaning of an “original” work of art in an era when cheap mechanical reproduction deprived the original of its distinctive, authoritative

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<sup>25</sup> See JACOB BRONOWSKI, *THE ORIGINS OF KNOWLEDGE AND IMAGINATION* (1978); JOHN DEWEY, *ART AS EXPERIENCE* (1934). For a contemporary example of this argument, see Barbara Bolt, *Heidegger, Handability and Praxical Knowledge*, (2004), available at <http://www.acuads.com.au/conf2004/papers/bolt.pdf> (accessed Nov. 29, 2010) (following Heidegger, characterizing creativity as skill rather than inspiration), in PUBLICATION OF THE CONFERENCE PAPERS ACUADS 2004 (Stephanie Jones ed., 2004), available at <http://www.acuads.com.au/conf2004/conf2004.htm>.

<sup>26</sup> See Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007). My research on the practice-based character of the creativity supported by the fair use doctrine occupies related theoretical space. See Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004).

<sup>27</sup> See Mario Biagioli, *From Print to Patents: Living on Instruments in Early Modern Europe*, 44 HISTORY OF SCIENCE 139, 139 (2006).

<sup>28</sup> See JO LAURIA & STEVE FENTON, *CRAFT IN AMERICA: CELEBRATING TWO CENTURIES OF ARTISTS & OBJECTS* (2007); Steve Fenton, *The Lost Chapter: Craft in America: Memory and the DNA of Creativity*, available at CRAFT IN AMERICA: A JOURNEY TO THE ARTISTS, ORIGINS AND TECHNIQUES OF AMERICAN CRAFT, available at [http://www.craftinamerica.org/book/story\\_201.php](http://www.craftinamerica.org/book/story_201.php) (accessed Nov. 29, 2010).

<sup>29</sup> See Michael Shanks & Jeffrey T. Schnapp, *rethinking art as craft in a knowledge economy: a manifesto*, in ART SCHOOL: PROPOSITIONS FOR THE 21ST CENTURY (Steven Henry Madoff ed., 2009); CHRISTOPHER M. KELTY, *TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE* (2008). The computer scientist Edward Felten refers to the related “freedom to tinker” as “your freedom to understand, discuss, repair, and modify the technological devices you own.” See *Freedom to Tinker*, available at <http://www.freedom-to-tinker.com/> (accessed Nov. 29, 2010).

<sup>30</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

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“aura.”<sup>31</sup> Andy Warhol took that suggestion to its logical conclusion, deliberately conflating art, craft and industrial production and centering his artistic and cultural enterprise in a facility known as the Factory.<sup>32</sup> Warhol’s work would hardly have been revolutionary had works of art traditionally been defined in terms of their craft-attributes; his work may be the single best argument for the proposition that creativity and craft overlap considerably, if they are not one and the same. Are craft works creative? The answer must be that they may be. What copyright law makes of that proposition is addressed in the next section.

### *Copyright’s Treatment of Craft*

Though things can be creative, copyright law goes to great lengths to exclude creative things from copyright protection. Surprisingly, in other words, a body of law that is calculated to encourage creativity goes out of its way not to encourage creativity in craft.

Copyright’s foundational principle, distinguishing the intangible, creative work of authorship protected by copyright from its material embodiment, is now stated in Section 202 of the Copyright Act:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.<sup>33</sup>

The second sentence of that section offers the standard explanation for the first. Distinguishing the intangible from the material is necessary in order to ensure that the flow of objects from person to person does not, in itself, entail the flow of copyright interests. If I sell you a book, I do not sell you the copyright that protects what the author wrote. I may not own that copyright or, if I do, I may want to sell or license the copyright separately.

Section 202 is not the only copyright provision that reflects the intangible/tangible distinction. Section 109(a), the doctrine of first sale, implements the second sentence of Section 202 by confirming that a sale or gift of a lawfully-produced copy of a work of

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<sup>31</sup> See Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, reprinted in ILLUMINATIONS 217 (Hannah Arendt ed., Harry Zohn trans., 1968).

<sup>32</sup> Whether Warhol and other Pop artists changed art, ended art, or extended an existing dialogue about art is the subject of lively critical commentary. Arthur Danto is well-known for his critique of Warhol as a revolutionary. See, e.g., ARTHUR C. DANTO, BEYOND THE BRILLO BOX: THE VISUAL ARTS IN POST-HISTORICAL PERSPECTIVE (1992). In a recent article, Louis Menand reports on an unpublished response to Danto by Bertrand Rouge, in which Rouge points out that Warhol’s celebrated Pop pieces (Brillo boxes, for example) were not in fact Brillo boxes but were carefully (and importantly) constructed reconstructions of Brillo boxes. Louis Menand, *Top of the Pops*, NEW YORKER (Jan. 11, 2010), at 57, 62. Was it art? Craft? Mass produced? Warhol toyed with the audience.

<sup>33</sup> 17 U.S.C. § 202 (2006).

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authorship does not infringe the copyright owner’s exclusive right to distribute copies of the work.<sup>34</sup> A “work of authorship” may exist – in the author’s mind, for example – prior to its “fixation” in a tangible medium; only upon fixation does copyright protection begin.<sup>35</sup> The definition of a copyrightable “work of authorship” draws the same line. Works of visual creativity, such as photography, painting, and sculpture, can be protected by copyright as pictorial, graphic, and sculptural (PGS) works, but only so long as the creative expression that they embody can be deemed to be “separable” from their materiality.<sup>36</sup> Exactly how to analyse “separability” is a question that continues to challenge courts; in some circumstances, “conceptual” separability is sufficient.<sup>37</sup> Conceptual separability is the ability to hold in one’s imagination a concept of the intangible work of authorship embodied in a thing, though it is impossible to specify what that means in practice, for it requires conjuring an (intangible) idea of (intangible) expression. That explanation is itself an intangible concept. Immateriality is the most slippery of slippery slopes.

Finally, there is the body of rules that addresses the creator’s so-called “moral rights,” which include the right to prevent harm to the integrity of the work, including destruction or mutilation of the author’s work, and to have the work properly attributed to the author.<sup>38</sup> In American copyright law, these are expressed primarily in Section 106A of the Copyright Act.<sup>39</sup> Section 106A expresses the ambivalence about intangible and material dimensions of original works of authorship that inheres in the concept of moral rights. On the one hand, the very idea of moral rights presupposes an act of intangible creativity that is transferred from the author to the work of authorship. The creative object “embodies” the author in one of several possible ways (the author’s labor, or the author’s identity, or the author’s personality, or the author’s moral standing), all of them pointing unequivocally to the notion that what is at stake is protecting rights in an intangible.<sup>40</sup> On the other hand, Section 106A deals largely with the materiality of the author’s work. Under Section 106A, the author’s rights extend only to certain works that are produced in limited editions, that is, those in which the author’s expression is most clearly expressed in the materiality of craft.<sup>41</sup> Moral rights in copyright reflect a kind of internal struggle, with the commitment to intangibility facing off against the pragmatics of artistic practice.

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<sup>34</sup> 17 U.S.C. § 109(a) (2006).

<sup>35</sup> 17 U.S.C. § 101 (2006) (definition of “fixed”). Copyright law does not consider the human brain to be a “tangible medium of expression,” an assumption that carries the law’s treatment of “creativity” as disembodied thought to its logical conclusion. David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. & TECH. 1 (1996).

<sup>36</sup> 17 U.S.C. § 101 (2006) (definition of “pictorial, graphic, and sculptural works”).

<sup>37</sup> See *Brandir Int’l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987).

<sup>38</sup> Moral rights are not, primarily, concerned with morality; rather, they are contrasted with the author’s economic rights, through which the author controls commercial exploitation of the work. The two frameworks are less distinct than they sometimes appear. See Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353 (2006).

<sup>39</sup> 17 U.S.C. § 104A (2006).

<sup>40</sup> See Rigamonti, *supra* note 38.

<sup>41</sup> 17 U.S.C. § 101 (2006) (definition of “work of visual art”).

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The first modern copyright law, the Statute of Anne, did not clearly differentiate among “expression,” “copyright” and “medium”; it referred to the “copy” and “copies” in “books,” intending that authors could own and transfer exclusive rights to print them.<sup>42</sup> What we now regard as distinct “expressive” and “tangible” things, or content and form, was a unity. “Copy” referred to both the author’s original manuscript and to the right to produce further copies. The first American copyright statute similarly referred to protectable and indivisible “maps, charts, and books.”<sup>43</sup> (Oren Bracha argues that the concept of the intangible literary work was known at the time, but also notes that a copyright referred to the exclusive right to manufacture copies of a specific text.<sup>44</sup>) Copyright’s modern duality, which we now read in Section 202, can be traced, instead, to judicial decisions in England and later, in the United States, adding the gloss that comes to us as the idea that copyright only protects intangibles. In England, *Pope v. Curl*<sup>45</sup> dealt with ownership of unpublished letters sent by Alexander Pope to Jonathan Swift. The letters having come into the possession of Pope’s enemy, the bookseller Curl, Pope sued to enjoin their publication. He won his injunction, and on Curl’s demand to lift the injunction, the Lord Chancellor refused, ruling that possession of copies of the letters did not entail the right to publish them. That right remained with the author.<sup>46</sup> That distinction between form and content appeared first in the United States in *Stevens v. Cady*,<sup>47</sup> which addressed the right to publish maps produced from a copperplate that had been seized to satisfy a judgment. Two years later, in a later opinion in the same case, *Stevens v. Gladding*,<sup>48</sup> the Court elaborated:

And upon this question of the annexation of the copyright to the plate it is to be observed, first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other. It was lawful for any one to make, own, and sell this copperplate. The manufacture of stereotype plates is an established business, and the ownership of the plates of a book under copyright may be, and doubtless in practice is, separated from the ownership of the copyright. If an execution against a stereotype founder were levied on

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<sup>42</sup> “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned,” 8 Anne., c. 19 (1710) (Eng.).

<sup>43</sup> “An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,” Act of May 31, 1790, § 1, ch. 15, 1 Stat. 124 (1790).

<sup>44</sup> See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 199-200 (2008).

<sup>45</sup> 2 Atk. 342 (1741).

<sup>46</sup> See Mark Rose, *The Author in Court: Pope v. Curl* (1741), 21 CULTURAL CRITIQUE 197 (Spring 1992).

<sup>47</sup> 55 U.S. 528, 530 (1852) (“The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence.”).

<sup>48</sup> 58 U.S. 447 (1854). Meredith McGill argues that the distinction between the author’s legal right and the physical object can be traced to *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 654-62 (1834), the first major American copyright case. See Meredith L. McGill, *The Matter of the Text: Commerce, Print Culture and the Authority of the State in American Copyright Law*, 9 AM. LITERARY HIST. 21, 41-42 (1997).

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such plates, which he had made for an author and not delivered, the title to those plates would be passed by the execution sale, and the purchaser might sell them, but clearly he could not print and publish the book for which they were made. The right to print and publish is therefore not necessarily annexed to the plate, nor parcel of it.

Neither is the plate the principal thing, and the right to print and publish an incident or accessory thereof. It might be more plausibly said that the plate is an incident or accessory of the right; because the sole object of the existence of the plate is as a means to exercise and enjoy the right to print and publish.

Nor does the rule that he who grants a thing, grants impliedly what is essential to the beneficial use of that thing, apply to this case. A press, and paper, and ink, are essential to the beneficial use of a copperplate. But it would hardly be contended that the sale of a copperplate passed a press, and paper, and ink, as incidents of the plate, because necessary to its enjoyment.<sup>49</sup>

The Court's reasoning (and that in *Pope v. Curll*) is notable in that there was virtually no consideration given to what object was or was not original, or expressive or creative. The intangible/material distinction was at least metaphysical and at most economic. The point of decision in each case was largely that the tangible object and the copyright were two separate "things," as if it were silly to conflate the two. To be sure, the opinions manifest sensitivity to the functional questions at stake, but those questions were largely economic, not artistic. Pope was not subject to the depredations of his nemesis Curll and could publish the letters independently; the party that seized the copperplate in *Stevens* did not get more value than it was entitled to.

As the legislative history underlying Section 202 later confirmed, the intangible/material distinction first identified in these cases did not immediately become a universal proposition of Anglo-American copyright, grounded in aesthetic or cognitive sensibilities. At least with respect to unpublished work, and in tension with *Pope v. Curll*, conveyance of a tangible expressive object included conveyance of the right to publish it. The House Report noted:

[T]he bill would change a common law doctrine exemplified by the decision in *Pushman v. New York Graphic Society, Inc.*, 287 N.Y. 302, 39 N.E. 2d 249 (1942). Under that doctrine, authors or artists are generally presumed to transfer common law literary property rights when they sell their manuscript or work of art, unless those rights are specifically reserved. This presumption would be reversed under the bill, since a specific written conveyance of rights would be required in order for a sale of any material object to carry with it a transfer of copyright.<sup>50</sup>

In short, the logic of copyright's insistence on protection for the intangible work of authorship produced by an author, and only for that intangible work of authorship, emerged not as part of the initial justification for copyright or part of its essential structure. It emerged out of the common law process by which courts decided how best to protect the

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<sup>49</sup> *Stevens v. Gladding*, 58 U.S. at 452.

<sup>50</sup> H.R. Rep. No. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

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legitimate interests of the parties before them, and as a result, the scope of the intangible/material distinction was, at least initially, rather modest.

Note that in the structure of copyright doctrine as reviewed above there are two, related, dualities at work. The first is between the tangible object that embodies a work of authorship on the one hand, and the copyright that attaches to that work of authorship on the other. This is the distinction that developed in *Pope v. Curl*, *Stevens v. Cady* and that is embodied now in Section 202 of the Copyright Act, for example. The second is between the tangible object that embodies a work of authorship, on the one hand, and the expressive work of authorship itself, on the other. This is the distinction that drives “separability” analysis with respect to PGS works, for example.<sup>51</sup> The two distinctions are closely aligned, to the point that some scholars, and perhaps many, simply identify the work of authorship with the copyright and declare that both constitute the intangible to be distinguished from the relevant tangible object. Only a small, emerging body of scholarship treats the concept of the intangible “work of authorship” as an analytically distinct and relevant thing.<sup>52</sup> It does so partly in declarative, metaphysical terms that echo the arguments of courts that divide the copyright from the work. Importantly for present purposes, it does so partly in service of functional aims, defining and redefining the work of authorship for reasons that oppose the goal of those courts. The point is to use the concept of the intangible work to limit the scope of the rights of the owner of the copyright in that work, rather than to preserve or extend them.

The proposition that the existence and character of a work of authorship can be shaped by legal doctrine is the link between the first duality (copyright/material object) and the second duality (work of authorship/material object). The distinction between the intangible and tangible attributes of creative works themselves is, in large part, a creature of the law itself. When copyright courts and lawyers go searching for the copyrightable “expression” that is distinct from the “tangible object” in which expression is embodied, they are engaging in a process taught, at least in the first place, by law and not by art.

What we now understand as a broad and fundamental intangible/material distinction applicable to the concept of creativity emerged during the late 18th century and during the 19th centuries, under the influence of the English poet Edward Young and the German

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<sup>51</sup> For present purposes, I need not brave the further challenge of deciding whether a work of authorship must be divided into intangible expression and intangible idea, or whether a work of authorship is, by definition, expression, which resides in a tangible object somehow independent of a work’s “idea” or “ideas.”

<sup>52</sup> See Cohen, *supra* note 26, at 1171 (relying in part on an unpublished manuscript by Olufunmilayo B. Arewa); Justin Hughes, *supra* note 12 (arguing that copyright should not extend to works that are, in effect, too small); Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381 (2005) (describing the ability of the law to affect the size and shape of its objects); L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright*, 46 HOUS. L. REV. 215 (2009) (arguing that the intangible work of authorship is unowned, as a matter of the First Amendment). *But see* Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725 (1993) (critiquing copyright’s construct of fixed, autonomous work).

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philosopher Johann Gottlieb Fichte. As part of the emergence of what Martha Woodmansee has described as the “romantic authorship” model of creativity during that period, and as part of an political campaign to promote property for authors,<sup>53</sup> Fichte, following Young, responded to the challenge of identifying and defining the singular “thing” that could be owned by an author even as that thing was multiplied in copies produced by a bookseller.<sup>54</sup> In *Proof of the Illegality of Reprinting: A Rationale and a Parable*, Fichte argued:

We can differentiate a book into two separate kinds: the *physical* one, the printed paper; and the *intellectual* one. Through the sale of the book, the property of the first undeniably turns over to the buyer. He can read it, and lend it out, as often as he wants, sell it again to whom he wants, as expensive or as cheap as he wants or can, or tear it up, or burn it; who could argue with him about that? However, since one also rarely buys a book for this, and most rarely buys one only to show off with its paper and print, and paper the walls with it; so one must also think of coming by a right to its intellectual aspect through the purchase. This intellectual aspect is namely further divided: into the *material*, the contents of the book, the ideas it brings about; and into the *form* of these ideas, the manner and connection in which the phrases and wordings are brought forward.<sup>55</sup>

An author’s *intellectual creativity* had an independent, intangible metaphysical existence that was linked to but distinct from any tangible carrier. And that independent creative thing could be the subject of property, owned, in the first place, by the author.

The implication of this abbreviated history is not that creativity does not have a significant intangible dimension, nor that what I define as craft is automatically or necessarily creative. Rather, the implication is that the distinction between protected expression and tangible medium now reflected in the law is a product of history, philosophical commitments, economic strategies, political argument and the common law; it is neither an eternal truth nor a fundamental law of the psychology of creativity. In stating a philosophical commitment to a distinction between intangible creativity and tangible things, Fichte expressed an argument that is in most respects the reverse of Aristotle’s view of making. Copyright was born in an era that viewed an author’s work as a unity – the copy, which was expression, manuscript and exclusive right all rolled into a single thing and which was or at least could be, in modern jargon, “creative.” Notwithstanding Fichte and the developments of the 19th century, it remains the case that material things are, or at least can be, creative, in ways that closely resemble if not always mimic those that characterize intangible original works of authorship. My suggestion here is not that all tangible objects

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<sup>53</sup> See Carla Hesse, *The Rise of Intellectual Property, 700 B.C.—A.D. 2000: An Idea in the Balance*, 131 DAEDALUS 26, 35 (2002).

<sup>54</sup> See Martha Woodmansee, *Genius and the Copyright*, 17 EIGHTEENTH-CENTURY STUD. 425 (1988), reprinted in *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* 49-55 (1994).

<sup>55</sup> JOHANN GOTTLIEB FICHTE, *PROOF OF THE ILLEGALITY OF REPRINTING: A RATIONALE AND A PARABLE* (1793) (translation from KARL-ERIK TALLMO, *THE HISTORY OF COPYRIGHT: A CRITICAL OVERVIEW WITH SOURCE TEXTS IN FIVE LANGUAGES* (forthcoming), available at <http://www.copyrighthistory.com/fichte.html> (accessed Nov. 29, 2010)).

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should be protected by copyright; rather the suggestion is that it is possible to treat some tangible objects as creative craft in themselves, without separating intangible creativity from tangible media. The repeal of Section 202 might be imagined, or the elimination of the “separability” requirement for PGS works. A tangible object might be an original work of authorship. If copyright is meant to encourage creativity, then why exclude creative things from its coverage? Considering justifications for the exclusion is the subject of the next section.

#### *Justifications for the Exclusion of Craft from Copyright*

The standard consequentialist justification for copyright raises at least two immediate objections to the possibility of copyright in craft works, or in things. The first is that such an expansion in the scope of copyright would prove administratively and commercially impractical, disruptive and harmful. We might call this the anti-monopoly objection. The second, more fundamental objection is that the standard public goods justification for copyright law is wholly inconsistent with the idea of copyright in craft works. Such expanded copyright is therefore unnecessary, and accepting it would impose unacceptable social costs. We might call this the public goods objection. The first objection is in part a special version of the second, but I treat them as distinct. The objections have less power than they initially appear to. The exclusion of copyright in craft works may be justifiable, but the omission probably has additional sources.

The administrative and commercial disruption that might accompany copyright in craft works is apparent at once. *Pope v. Curl* and *Stevens v. Cady* each adopted early versions of the distinction between intangible and material property precisely to clear the way for commercial arrangements that those courts believed appropriately respected the interests of each party. The doctrine of first sale evolved for related reasons. In the most famous first sale case in American law, *Bobbs-Merrill Co. v. Straus*,<sup>56</sup> the Supreme Court limited a publisher’s copyright in its book to the first authorized sale of each volume, despite a printed notice in each volume that asserted that resale at a price lower than that specified by the publisher would be treated as an infringement of copyright. Inelegantly, the Court expressed its concern that the publisher might control not only the initial market for copies of its books, but also subsequent markets for their resale:

This conclusion is reached in view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work,-a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author’s thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price

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<sup>56</sup> 210 U.S. 339 (1908).

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fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.<sup>57</sup> The Court was speaking directly of concerns that the copyright owner would acquire a monopoly over all markets in which its books were distributed, even though it was unwilling or unable to express those concerns directly in antitrust terms.

Later scholars identified related problems in the idea of equitable servitudes on chattels. A copyright in a material object, limiting what the possessor of that object might do with it, would amount to a kind of servitude that would needlessly interfere with commerce. What objects could be so protected? What kinds of limitations would be permitted? How would any individual know the scope of the legal limits that might accompany a given object? Servitudes in land were (and are) subject to rules that limit the kinds of restrictions that can be imposed on later landowners; land transfers are relatively infrequent and highly ritualized; recording systems make it mostly straightforward to impose on both transferors and acquirers of land certain duties to notify and to investigate the condition of legal title. Servitudes in land are traditionally legitimate. The world of objects is far denser, faster paced, less ritualistic and not subject to effective recording systems. Servitudes in chattels are suspect.

The analyses that pointed out these concerns also offered ways to limit them. Zechariah Chafee observed in 1928 that copyright operates less like a servitude than a patent does, because copyright, unlike patent, does not embrace the exclusive right to control use of the protected work.<sup>58</sup> In other words, the extent to which copyright in an object might obstruct commerce in things depends on the shape of the copyright in the first place. Patents in things, or more precisely, patents that cover innovative technologies built into tangible objects, pose a greater potential threat to commerce, because patent law includes the exclusive right to “use” the patented invention, even after a device embodying the invention is sold.<sup>59</sup> Patent law mitigates this threat in a variety of ways: It includes an “exhaustion” principle that corresponds roughly to copyright’s doctrine of first sale.<sup>60</sup> Patents are not available until an application for a patent has been examined by the Patent Office and a patent has been issued. Prospective users of an invention have access to a public database of patents that corresponds, crudely, to an index of recorded interests in land. So long as copyright lacks an exclusive “use right,” and so long as copyright remains limited to the core purpose of permitting the copyright owner to control reproduction and distribution of

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<sup>57</sup> *Id.* at 350-51.

<sup>58</sup> See Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 998-1005 (1928).

<sup>59</sup> 35 U.S.C. § 271 (2006).

<sup>60</sup> *Quanta Computer, Inc. v. LG Electronics, Inc.*, 128 S. Ct. 2109 (2008). The subject matter of patent law is, of course, far broader than innovation manifested in machines. 35 U.S.C. § 101 (2006). The extent of limitations on patentable subject matter, and the scope of overlaps between patent and copyright in computer technology, are in flux. *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008), *cert. granted sub nom. Bilski v. Doll*, 130 S. Ct. 3218 (2010).

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multiple copies of the work, then permitting copyright to apply to creative chattels imposes relatively modest burdens on commerce. The doctrine of first sale mitigates the major remaining burden, by limiting the copyright owner's right to distribute copies of the work and thereby separating the initial market for the work from resale markets for the work.

More significant problems have emerged in recent decades with the rise of a *de facto* use right in copyright,<sup>61</sup> which exists via interaction of the exclusive rights to reproduce the work in copies (the reproduction right) and to display and perform the work publicly (the display and performance rights) and the fact that virtually all computer code is both protected by copyright and cannot be used without being reproduced or displayed or performed, or both. A printed book can be used (that is, read) without being reproduced; using an electronic or digital book requires its reproduction, display or performance. Given the existence of these *de facto* use rights, copyright in creative chattels (a phrase that I use only for the limited purpose of discussing servitudes) imposes problematic burdens on later users. Scholars have analysed those burdens at length.<sup>62</sup> Those burdens might be mitigated by reform of the copyright law (an expanded doctrine of first sale, for example). Copyright reform seems unlikely. Promising solutions have emerged via private institutions. Recent scholarship on servitudes in copyright law suggests that modern technologies and emerging forms of private ordering, such as open source and Creative Commons licenses, can mitigate the commerce-inhibiting effects of servitudes on creative chattels,<sup>63</sup> largely by solving the problems of giving adequate notice of restrictions on use to later users, and by standardizing the types of restrictions that are used. In the context of copyright in computer chattels, that is, original computer programs and other digital (but material) works, servitudes have become commonplace and have not proved unduly problematic.<sup>64</sup>

Even if the commercial burdens possibly associated with copyright in craft works can be overcome, there remains the more basic question of justification. Is copyright in craft works even necessary? Copyright's distinction between the intangible work of authorship and the material form that embodies that work plays into a central tenet of the consequentialist account. Copyright is needed not merely to encourage the production and distribution of creativity. As economists have taught us over the last 25 years, copyright is needed to solve a specific economic problem associated with the production of intangibles. Intangible works of authorship are species of information or knowledge goods, and information or knowledge goods are kinds of "public goods." Intangible public goods are nonrival, which means that consumption of one item of that kind (one copy of a book, for example) does not deplete the supply of that kind available to others, and nonexcludable,

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<sup>61</sup> See Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008).

<sup>62</sup> See Madison, *supra* note 51.

<sup>63</sup> See Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008). David McGowan referred to license restrictions on computer programs that bind downstream users as "covenants that run with the code." David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241, 268-71 (2001).

<sup>64</sup> See Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 279-82 (2003) (describing how software licensing depends on the concept of the "licensed program," or material thing).

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which means that producers of those goods are unable to appropriate returns via market transactions. Nonrivalry and nonexcludability create a problem of incentives. Rivalry and excludability are keys to creating markets in things. With no price, there is no return; with no return, producers will not produce. If authors and publishers cannot recover the cost of producing new books, then they will not produce new books.

Copyright law steps in to protect authors and producers. Copyright cannot create rivalry, but it can offer degrees of excludability. Copyright punishes me if I share the intangible contents of a book that I purchase, at least under some circumstances – if I share those intangible contents by making and distributing my own tangible copies, or by performing or displaying those contents publicly.<sup>65</sup> The discipline of the legal sanction enables authors and publishers to set prices and to make money. Of course, copyright represents a tradeoff. By permitting authors and publishers to set prices and make money, copyright imposes costs on those who read and rely on creativity, including both ordinary consumers and other authors who build on earlier work, all of whom typically pay to access creative works. Copyright law offers reasonable efforts to mitigate those costs, by limiting the scope of copyright to what is needed to produce new creativity. Copyright does not protect unoriginal “facts” or “ideas”; its scope is limited to the author’s “expression”; copyright permits some “fair use” of the author’s work.

The economic logic of copyright, that it is designed to solve a public goods problem and encourage the production of creative works of authorship, does not apply, on its face, to the question of creative craft works. Craft works are rival. There are no public good barriers to creating effective markets for them. Creators of these things have “ordinary” market-based incentives to produce their works: scarcity of supply and the sizable challenges inherent in reproducing works whose aesthetic appeal lies largely in their irreproducibility. Offering copyright protection to these creators would impose costs on society, similar to the costs described above with respect to the burdens on commerce imposed by servitudes on chattels, that would not be warranted by offsetting benefits. Via markets for chattels, those benefits would be available anyway. The idea that copyright protects intangible works of authorship is tightly bound up with the central economic justification for copyright, and copyright in craft works simply has no place in that argument.

The strength of the public goods objection to copyright in craft works depends, however, on the strength of the claim that copyrightable works truly can be separated into intangible original works of authorship on the one hand, and tangible forms on the other. As I pointed out above, within copyright doctrine itself much of that distinction stems not from recognition of an organic difference that is natural to creators and creativity, but instead from judicial and philosophical judgments that drawing that line was and is necessary to protect the interests of authors and other copyright owners. The line between intangible creativity and tangible objects is made, not given. The earliest copyright statutes drew no such distinction. The fact that the line was not present in the early history of copyright does not mean that the line cannot or should not be drawn, or that in some metaphysical sense, that it cannot exist. But the line established by Section 202 and in “separability” analysis

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<sup>65</sup> 17 U.S.C. § 106 (2006).

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applicable to PGS works, for example, has to be justified, not merely assumed, just like any other legal rule. The distinction between copyright protection for intangible works of authorship and its absence for material forms cannot be justified entirely by the public goods argument, because the public goods argument depends largely on the *premise* that there is a distinction between intangible works of authorship and material objects. The partial circularity of the public goods argument should be acknowledged.

The economic justification for copyright should not be overstated, but it should not be discarded. Copyright in computer programs and other digital works demonstrates the power of the public goods justification in the context of works that might be characterized as wholly intangible (though digital technology might also be termed a type of materiality). The legally-mandated distinction between the original work of authorship and the tangible medium is, to a meaningful degree, not only unnecessary in this context but resisted by copyright owners. Producers of these digital works clearly face problems of nonrivalry and nonexcludability with respect to potential users of those programs.<sup>66</sup> Copyright protection solves those problems and provides an appropriability mechanism for those producers, but only up to a point. Over time, and via industry practices, those producers have filled the gap that they perceive between the protection that the law offers and the true scope of the appropriability problem. How? Via licenses and restrictive notices by which the copyright owner claims ownership of the material work, among other things, they try to collapse the distinction between the work of authorship and the tangible medium.<sup>67</sup> Copyright law pushes back, most recently in cases questioning the scope of the doctrine of first sale as applied to digital works.<sup>68</sup> The public goods justification for copyright turns out to have an uncertain foundation in distinguishing between intangible works and material objects, and when it is applied to a true intangible, computer programs, producers of those programs seek (partial) refuge in materiality. In the end, if a justification for excluding copyright in craft works is to be found, it has to be found merely in the economic logic of copyright, which is incomplete, but elsewhere.

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<sup>66</sup> See Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994) (describing a route to solving this problem without the costs of copyright). Scholars have identified a range of contexts in which materiality, including material practices (social norms) provide solutions to appropriability problems regarding public goods, or putting the same proposition differently, suggest that the scope of a public goods “problem” is less severe than an exclusive focus on intangibles might suggest. See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281 (1970) (discussing the economics of the book publishing industry); Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy*, 94 VA. L. REV. 1787 (2008) (discussing social norms among stand-up comics); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006) (discussing fashion design).

<sup>67</sup> See Madison, *supra* note 64 (describing practices of software licensors that focus on licensing program copies); Michael J. Madison, *Notes on a Geography of Knowledge*, 77 FORDHAM L. REV. 2039 (2009) (describing circumstances of recent copyright first sale and patent exhaustion cases).

<sup>68</sup> *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (rejecting application of doctrine of first sale to re-sale of “licensed” software).

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### III. The Ethics of Craft

The distinction between intangible creativity and material creativity is, at bottom, philosophical as well as economic, which is to say that it is ethical. Fichte, who is the philosopher most directly connected with the origins of that distinction in law, worked in the natural law tradition.<sup>69</sup> Identifying and recognizing the intangible expression of the author was an effective way to protect the economic interests of the author, to be sure, but in Fichte’s hands the separation of intangible from material was also a way to identify and protect the distinctive personality and identity of the author.<sup>70</sup> The author, in short, had ethical standing as an individual that deserved to be protected regardless of the economics of the author’s exploitation by publishers. “Desert” does not quite capture Fichte’s argument; his claim was that the author’s expression was incapable of appropriation by others and that property in the expression necessarily remained with the author. The English philosopher John Locke is more often associated with the concept of rewarding the author for his labor, but in the Lockean framework, the argument is likewise ethical, and likewise tied to the intangible expression produced by the creator.<sup>71</sup> In terms of the history of copyright, designing the law to protect intangible interests was not, originally, an economic argument.

Despite the fact that this distinction has acquired an economic cast, in practice and in copyright doctrine it retains a strong ethical flavor, to the point that the Supreme Court has gone out of its way to try to exclude ethical considerations from copyright analysis.<sup>72</sup> Copyright law does not merely seek to recognize intangible works of authorship because society needs to create incentives to produce and distribute them – and does not need to create incentives to produce and distribute material things. Copyright’s embrace of consequentialist justifications means that the law affirmatively excludes the material. Copyright in craft works is not part of copyright law because the law makes an ethical judgment, not because craft works are outside the now-standard public goods account of copyright.

For present purposes, Fichte has a modern counterpart in the sociologist Richard Sennett. In *The Craftsman*,<sup>73</sup> Sennett both describes and argues the proposition that humans are and should be *makers* (recalling Aristotle<sup>74</sup>), and makers of material things, and that their

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<sup>69</sup> See Maurizio Borghi, *Owning Form, Sharing Content: Natural-Right Copyright in the Digital Environment*, in 5 NEW DIRECTIONS IN COPYRIGHT LAW 197 (Fiona Macmillan ed., 2007).

<sup>70</sup> See *id.*

<sup>71</sup> Tying ethics to intangibles in the Lockean framework is common both to those who are sympathetic to Locke in copyright, see Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75 (2004), and to those who critique Locke. See Carys J. Craig, *Locke’s Labor and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEEN’S L.J. 1 (2002).

<sup>72</sup> See *Feist Publ’ns, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) (rejecting the possibility that a work of authorship might be “original” by virtue of the author’s labor and investment in creating it, sometimes known as the author’s “sweat of the brow”).

<sup>73</sup> See RICHARD SENNETT, *THE CRAFTSMAN* (2008).

<sup>74</sup> Sennett focuses on Aristotle’s and Plato’s respective ethical views of “artists” and “artisans,” treating the question of making as distinct. See *id.* at 23.

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status as makers was and is avowedly ethical. In Sennett’s words, “people can learn about themselves through the things they make. . . . [W]e can achieve a more human material life, if only we better understand the making of things.”<sup>75</sup> Sennett writes about craftsmanship, “the skill of making things well.”<sup>76</sup> His usage is not of a piece with what I refer to here as craft in tangible things; Sennett is interested in the discipline of skilled craft whether or not it results in something tangible. But he focuses on a phenomenon that is clearly and closely linked to the “creativity” that is the focus of modern copyright. He

explores these dimensions of skill, commitment, and judgment in a particular way. [He] focuses on the intimate connection between hand and head. Every good craftsman conducts a dialogue between concrete practices and thinking; this dialogue evolves into sustaining habits, and these habits establish a rhythm between problem solving and problem finding. The relation between hand and head appears in domains seemingly as different as bricklaying, cooking, designing a playground or playing the cello – but all these practices can misfire or fail to ripen. There is nothing inevitable about becoming skilled, just as there is nothing mindlessly mechanical about technique itself.<sup>77</sup>

Sennett traces the rise of art (distinct from craft) and the notions of “originality” and “creativity” to changes in the institutional settings of material production during the Renaissance. “Craft” denoted (and still connotes) a status of personal autonomy that was increasingly threatened in the context of various emerging hierarchies; establishing a rhetoric of originality and especially “creativity” was a way for the individual to recover some autonomy, no matter what the institutional context.<sup>78</sup> Sennett might seem to be naively ignorant of the realities of modern industrial production, but his philosophical stance is hardly new. The Victorian essayist John Ruskin took essentially the same position. “Give a worker the chance not merely to manufacture or assemble, but actually to create, and you lay open the road to a life of redemptive beauty. To those whom the scripture could not preserve, the experience of true artistic craftsmanship might yet give salvation.”<sup>79</sup>

The result, in historical terms, was a new bridge between the ethics of “making” as ennobling and the concept of “creativity” as an essentially internal process. In other words, like Fichte Sennett argues that philosophically speaking, creativity is an ethical construct, not

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<sup>75</sup> *Id.* at 8.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 9.

<sup>78</sup> *See id.* at 69-72.

<sup>79</sup> John Matteson, *Constructing Ethics and the Ethics of Construction: John Ruskin and the Humanity of the Builder*, CROSS CURRENTS (Fall 2002) (describing Ruskin and his ethics of architecture, as expressed in *The Seven Lamps of Architecture* (1849) and *The Stones of Venice* (1851-1853)). As the reference to Ruskin suggests, Sennett is trying to rehabilitate a pre-modern tradition. He is hardly alone. In another recent retelling, Matthew Crawford popularizes the point in a work whose title speaks its thesis. *See* MATTHEW B. CRAWFORD, *SHOP CLASS AS SOULCRAFT: AN INQUIRY INTO THE VALUE OF WORK* (2009). Crawford’s book began as an article in *The New Atlantis*. *See* Matthew B. Crawford, *Shop Class as Soulcraft*, *THE NEW ATLANTIS* (Summer 2006).

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only or even primarily a psychological phenomenon. Industrialization and mechanization during the 19<sup>th</sup> and 20<sup>th</sup> centuries pushed creativity and art to distinctly valued class and cultural plateaus; the economics of mass production and mass consumption led not just to an explicit but unjustified divorce of the hand from the head, but also to a marriage of the head and the wallet. In earlier work, Sennett described the changes wrought among bakers by the mechanization of the process of producing bagels and baguettes; they become machine operators.<sup>80</sup> In historical and pragmatic terms, craftworks became commodities, to be “produced” by firms rather than made by oneself. With books at the high end as with bagels at the low end. Creators and consumers became two distinct classes.

The idea that working and making are jointly creative echoes in some recent work in copyright that is trying to similarly rehabilitate the concept that consumers of copyrighted works are (ethically and normatively valued) creators, or at least are and should be permitted to be more actively engaged with works of authorship than standard copyright rhetoric tends to assume. Rebecca Tushnet has called attention to the creative value inherent in consumer and reader engagement with the materiality of expressive works.<sup>81</sup>

The link between Sennett and copyright in craft works is more subtle, because unlike scholarship celebrating the complex of intangible creativity not grounded in economic incentives, Sennett focuses our attention on the disciplined creativity that is manifest in craft works, and he does so not only for the consequentialist reasons that drive most inquiries into creative re-use or re-mixing of copyrighted works (that is, he is not interested principally in arguments that encourage more people to make more things). Instead, Sennett emphasizes the creation of the tangible because of how processes of creation affect us as human beings. Matthew Crawford’s *Shop Class as Soulcraft* makes this point even more directly.<sup>82</sup> And that is the point where their argument runs into the concrete wall of copyright’s distinction between intangible works of authorship and material artifacts.

That distinction therefore represents not merely the assimilation of an early ethical argument about authors to a modern conception of copyright manifesting and perpetuating the economics of commodified creativity. The Copyright Act does not merely ignore the ethical interests of authors in craft. It rejects them, as it rejects the idea that one might be a “creator” if one is not working at the level of the intangible. That rejection is unequivocal in the statute itself,<sup>83</sup> but if that were not enough, then the Supreme Court’s opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>84</sup> completes the task.

*Feist* anchors the entirety of modern copyright law. Rural Telephone Service compiled and published white pages telephone directories. Feist Publications, a competitor,

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<sup>80</sup> See RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* 71-73 (1998).

<sup>81</sup> See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

<sup>82</sup> See CRAWFORD, *supra* note 79.

<sup>83</sup> See *supra* notes 33-41 and accompanying text.

<sup>84</sup> 499 U.S. 340 (1991).

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copied listings from Rural and published its own directories. Rural sued Feist. The Supreme Court ultimately ruled that Rural had no legitimate copyright claim, because the phone numbers themselves were “facts” not protectable by copyright, and the directories were unoriginal “compilations” of fact. *Feist’s* principal and essential contribution to copyright law is the articulation of the “minimal creativity” threshold for copyright protection, a standard the Court located in the Constitution.

The Court might have stopped there and rested its argument on the nuances of originality and creativity in fact-based works of authorship, but it did not. Instead, the Court went on a wide-ranging excursion into copyright history, seeking out and extinguishing the possibility that any copyright claimant might have a valid interest by virtue of the so-called “sweat of the brow” doctrine. Copyright owners in some earlier cases had prevailed on the theory that the time and labor invested in a work of authorship justified the award of a protectable copyright interest. In *Feist*, the Court rejected that possibility once and for all, and in terms that made it clear that the Court regards economic justifications for copyright as the only legitimate arguments in the copyright context.<sup>85</sup> Permitting “sweat” or labor-based claims in copyright would permit claimants to control (unoriginal) facts; in turn that would require new users of those facts to invest their own labor in collecting those facts. An economic reading of that argument would frame the second claimant’s efforts in terms of waste; the second claimant (and all similarly situated second claimants) should be permitted to engage in a kind of free-riding that is socially beneficial.<sup>86</sup> The Court’s conviction, however, is not that material practice (such as labor) cannot be the basis for creative expression. The Court is convinced that it should not be. What Richard Sennett’s work suggests, as it looks back centuries, is that this is more than an economic argument; it is an ethical one. The telephone directories under consideration in *Feist* were just about as far from craft works as one might imagine. But the process-oriented “sweat of the brow” justification rejected by the Court sweeps broadly, and its rejection speaks directly to the kind of craft-making process that Sennett celebrates. The Court looked the ethics of copyright law in the eye, and it rejected them.

#### **IV. Conclusion: What Craft Can Offer Copyright**

*Feist*, on most readings, is a case about copyright in facts. I claim that it encapsulates and terminates an argument about ethics and about craft, an argument which began centuries ago. In this conclusion, I point to some implications of that argument for copyright policy and doctrine.

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<sup>85</sup> *See id.* at 352-54. The Court has since reaffirmed this view, in terms that make clear that the Court believes that economic justifications for copyright have always been the only valid bases for argument. *See Eldred v. Ashcroft*, 537 U.S. 186, 236 (2003).

<sup>86</sup> *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980), offers an example of a court refusing to protect facts at least partly on the ground that the law should avoid requiring duplicative effort. The defendant was cleared of a claim of infringement by a historian who argued that a motion picture dramatization of the Hindenberg incident appropriated his historical reconstruction of the event.

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Beginning with questions about creative objects, or craft works, this chapter has examined the creativity-related aspects of copyright's distinction between original "works of authorship" and material objects. It argues that notwithstanding the proposition that copyright operates under a "non-discrimination" principle with respect to the sorts of works that copyright can protect, forms of creativity that are expressed directly in material form, specifically the craft aspects of material production, are excluded from copyright protection. This exclusion is more doubtful that it might appear under the economically-oriented policy frameworks usually applied to justify copyright law, largely because the distinction between intangible works of authorship and tangible objects is constructed from philosophical argument as much as it relies on psychological phenomena or economic realities. And the exclusion has a direct impact on the scope of ethical claims that might be made within copyright. There is a long and respectable tradition of arguments made on behalf of ethical arguments in craft, and copyright law affirmatively rejects those arguments.

The chapter has not argued that this state of affairs is necessarily inequitable or suboptimal from a social welfare standpoint. Rather, it is a description of the choices that the law has made and continues to make. Creativity and creation are not given to the law. The law "creates" creativity, in a sense, by recognizing some (the intangible products of the mind) and rejecting others (the tangible products of the hand). Elsewhere I have suggested that the structure of intellectual property laws might be investigated profitably from the standpoint of the kinds of institutions and disciplines that intellectual property law enables.<sup>87</sup> That point leads to a key implication of this chapter. Robert Merges and Neil Netanel, among others, each have argued that a chief virtue of copyright has been its success in supporting the existence of an independent "creator" class of artists who do not depend on the state or private patrons for their support.<sup>88</sup> If society desires to construct an equivalent "craft creator" class, then the scope of copyright, and particularly the statutory implementation of the intangible/material distinction, should be revisited. The Constitution authorizes the enactment of copyright in "Writings."<sup>89</sup> Perhaps copyright should again subsist in "books."

That suggestion, while discomfiting in the sense that it contradicts a well-established axiom of modern copyright, leads to a series of implications for the law itself. Earlier in this chapter I noted that some scholars have begun to explore theoretical justifications for consumer reworking and re-mixing of copyrighted works of authorship. In doctrinal terms, that reworking touches on the scope of the doctrine of fair use, and on the scope of the copyright owner's exclusive right to prepare derivative works. Some of that scholarship mostly retains copyright's standard intangible/material object distinction with respect to creativity.<sup>90</sup> Some explores versions of creativity situated in material practice,

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<sup>87</sup> See Michael J. Madison, *Open Secrets*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH* (Rochelle C. Dreyfuss and Katherine J. Strandburg eds., 2010) (forthcoming).

<sup>88</sup> See Robert P. Merges, *The Concept of Property in the Digital Era*, 45 *HOUS. L. REV.* 1239 (2008); Neil Weinstock Netanel, *Copyright in a Democratic Civil Society*, 106 *YALE L.J.* 283 (1996).

<sup>89</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>90</sup> See Tushnet, *supra* note 81.

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including objects and space.<sup>91</sup> An expanded theory of copyright that embraces creativity in the tangible thing, that is, in craft works, might offer an additional analytic tool for measuring the proper scope of copyright as a whole. Copyright in craft works might appear to extend the law beyond its current boundaries, but it might also limit the scope of the right to the boundaries of the tangible object itself and generate more opportunities for fair and non-derivative reworking.

A final implication bridges traditional and modern applications of the idea of creative craft, moving from things produced with hand tools to things molded with keyboards and mice. The chapter noted the awkward fit between copyright's intangible/material object distinction and computer programs and other digital works, which impacts the operation of the doctrine of first sale in the digital context, and interpretations of software licenses.<sup>92</sup> Suppose the law were to formally recognize copyrightable creative things in the digital context, allowing creators of computer programs and other digital works to exercise a set of exclusive rights in those things that was parallel (though not necessarily identical in all respects) the set of exclusive rights that attaches to intangible works of authorship today? Adjustments to laws governing preemption of state laws applicable to copyrighted works<sup>93</sup> might be required. The result, however, would be a public law of software and digital content licensing, rather than the kind of private law that is the subject of much skepticism and criticism.<sup>94</sup> It is a possibility worth pondering, even if I stop short of recommending it. Reconsidering creativity and craft challenges copyright to examine broad questions of justification. It also points to some new possibilities in addressing precise and difficult questions in contemporary practice.

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<sup>91</sup> See Cohen, *supra* note 26.

<sup>92</sup> See *supra* notes 66-68 and accompanying text.

<sup>93</sup> See 17 U.S.C. § 301 (2006).

<sup>94</sup> See Madison, *supra* note 64; Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479 (1995); Joel Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 HOUS. L. REV. 1073 (2007).