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James Grimmelman

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## Ethical Visions of Copyright Law

### Cover Page Footnote

Associate Professor of Law, New York Law School. Aislinn Black, Samir Chopra, E. Gabriella Coleman, Deven Desai, Doni Gewirtzman, Wendy Gordon, Dan Hunter, Molly Beutz Land, Frank Pasquale, Rebecca Roiphe, Clerk Shaw, and Richard Sherwin commented on earlier drafts, as did participants in the When Worlds Collide Symposium at Fordham Law School and the Cyberscholar Working Group at Yale Law School. This essay is available for reuse under the Creative Commons Attribution 3.0 United States license, <http://creativecommons.org/licenses/by/3.0/us/>.

# THE ETHICAL VISIONS OF COPYRIGHT LAW

*James Grimmelmann\**

## INTRODUCTION

All of intellectual property law is an act of imagination. If a tree falls in a forest and no one is around to call it “property,” the tree still exists. But the objects of intellectual property have no existence apart from what we give them. You can’t copyright an unwritten novel; you have no trademark rights in a word the consuming public has never heard of. We must imagine these things into being before we can make them the subject of legal rights and obligations.

Nor is the work of imagination done at the moment of creation. We must constantly play a game of practical metaphysics to grant legal rights over things that can’t be seen or touched. When the legal system says that this assembly of gears and levers infringes on that set of marks on a piece of paper, it’s calling an abstraction into being. The “invention” that connects the two is itself a creation of the legal mind no less than the arrangement of parts is a creation of the engineering mind. Lawyers must decide whether a given abstraction is an invention at all (most of us would agree that a short story isn’t one); whether it has attributes like “new,” “useful,” “obvious,” and so on; and what exactly its limits are. None of these distinctions come ready-made in nature; they require continuous, purposeful, collective imagination. Like Tinkerbell, intellectual property really would vanish if we stopped believing in our ability to see it.

And if we must imagine intellectual property law, it must also imagine us. Every body of law has an internal logic to it, a logic drawn from and reflected in the social relationships it imagines among the people subject to it. Thus, for example, Carol Rose observes that property law validates exclusionary self-interest while also presuming that people are generally inclined to respect each other’s claims to property; it therefore imagines a “morality . . . not presum[ing] saintliness, but . . . not made for total

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\* Associate Professor of Law, New York Law School. Aislinn Black, Samir Chopra, E. Gabriella Coleman, Deven Desai, Doni Gewirtzman, Wendy Gordon, Dan Hunter, Molly Beutz Land, Frank Pasquale, Rebecca Roiphe, Clerk Shaw, and Richard Sherwin commented on earlier drafts, as did participants in the *When Worlds Collide* Symposium at Fordham Law School and the Cyberscholar Working Group at Yale Law School. This essay is available for reuse under the Creative Commons Attribution 3.0 United States license, <http://creativecommons.org/licenses/by/3.0/us/>.

sinner” either.<sup>1</sup> We might similarly ask what copyright law thinks of when it thinks of us.

This essay will give one possible answer to that question: copyright law imagines that we are ethical<sup>2</sup> beings, capable of being creative and of being touched by the creativity of others, inclined to be sociable and to return good for good. It has in mind a *deontic vision of reciprocity in the author-audience relationship*. Or, more succinctly, authors and audiences ought to respect each other.

That may sound like a platitude, but it isn't. Everyone agrees that authors and audiences ought to respect each other, but they come to blows over how that respect ought to be expressed. The Recording Industry Association of America (RIAA) thinks that audiences don't respect authors enough; the Electronic Frontier Foundation (EFF) counters that it's the authors who aren't showing enough respect for audiences. Meanwhile, free software advocates and fans of the commons sketch pictures of respectful exchange that look very different from the marketplace exchanges that both the RIAA and EFF treat as normal.

We can learn some very interesting things about the state of the copyright debate by looking closely at those disagreements. When the EFF tells the content industries not to “sue their customers,” it's making an ethical argument that's the mirror image of the content industries' call for people to “respect copyrights.” The arguments are the same, just directed at opposite sides of the author-audience relationship. Compare those arguments with the genuine radicalism in the way that some free software advocates don't care whether programming remains a viable profession. They see legal restrictions on user freedoms as inherently unethical; no amount of software produced or programmers employed could justify them.

As scholars, we should pay attention to these ethical visions, because they are descriptively important to how people behave, because they affect the persuasiveness of our policy arguments in the public arena, and because they make provocative claims about what intellectual property law ought to look like. This essay will find evidence of these visions in the language and structure of intellectual property law, and in the rhetoric that activists use as

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1. Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1900 (2007); see also Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1866 (2007) (“[P]roperty is critically dependent on simple moral intuitions about the importance of protecting possession against unwanted invasions . . .”).

2. I use the term “ethical” rather than “moral” for three reasons. First, “moral rights” is a term of art in intellectual property law, and I wish to avoid confusion. Second, “moral” has come to have overtones of religious morality, particularly on sexual matters, whereas this essay is about issues of good and bad in a broader, more secular sense. Third, “morality” suggests a comprehensive view and a grounding of one's theory of good and bad actions in a broader theory of right and wrong. On the other hand, “ethics” suggests instead a more specific focus on context, roles, and relationships, and is therefore closer to the issues this essay raises. When I refer to “moral” questions or theories in this essay, it is specifically to call attention to the fact that the overall grounding in a more complete theory of right and wrong is at stake—or because a familiar phrase such as “moral authority” simply sounds awkward if altered.

they make arguments about intellectual property. These ethical visions link copyright law's rules to a model of how those regulated by copyright law could and should behave.

This essay's approach is descriptive, rather than prescriptive: it doesn't argue that these ethical frameworks correctly tell us what intellectual property should look like, only that people use these frameworks to talk about intellectual property. The approach is ethical, rather than metaethical: it focuses on the specific rhetoric people apply to real controversies, rather than on abstracted principles that could be applied to any issue. And the approach is agnostic, rather than authoritative: it argues that relational ethics is a different and interesting way to study intellectual property, not necessarily the only or the best way.

Part I of this essay justifies the use of this "ethical vision" discourse. It analyzes trade secret law in ethical terms, then abstracts from the example to show how the ethical arguments involved are derived from standard normative frames for talking about law. It then isolates the key commitments that this way of speaking about intellectual property entails.

Part II takes up copyright law, the essay's main focus. It argues that the default ethical vision of copyright law contemplates authors and audiences who participate in a respectful marketplace exchange. The relationship isn't symmetric—authors supply creativity, while audiences supply money—but it is reciprocal. When people buy and sell copies of copyrighted works at fairly negotiated prices, they're respecting each others' needs and autonomy.

Part III uses the default ethical vision to illuminate some of the rhetoric of modern arguments about copyright law. It considers four common rhetorical clusters: "Downloading is theft," "Don't sue your customers," "Software should be free," and "I love to share." All four start from the default ethical vision of copyright, but they take it in very different directions.

Part IV then puts these rhetorics into conversation with each other. They all have something interesting to say about the tensions copyright law faces at the seams between different systems of production with different values. It focuses on the challenge potentially posed by free software, Creative Commons, and a culture of sharing to a commercial system of copyright. This interface is sometimes depicted as a purely economic one, or as a clash between competing consequentialist visions of society. This essay reminds us that there's also an ethical dimension to the interface; participants have very different ideas of what it is to act ethically in one's dealings with others when there are copyrights involved.

The essay concludes by pulling the lens back and asking what larger lessons we might draw. It connects the ethical arguments analyzed herein to some more traditional debates in intellectual property law and policy, and sketches a few interesting potential further avenues of research.

## I. ETHICAL VISIONS

This part develops just enough theory to demonstrate that an “ethical vision” can provide a way of looking at intellectual property that’s neither completely trivial nor easily reducible to one of the more conventional approaches. It starts by giving an ethical reading of trade secret law; the goal is to convince you that readings of this sort are interesting enough to warrant further consideration. Having done so, it then explains how we can employ this ethical mode of analysis without having to rip out and recreate the usual apparatus we use to make normative arguments.

A. *Trade Secret*

Start with trade secret, the most explicitly moralistic field of intellectual property. In the U.S. Supreme Court’s words, “[t]he maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.”<sup>3</sup> Notice that this view treats “commercial ethics” as distinct from “the encouragement of invention”—and notice which comes first.

Trade secret law is full of ethical rhetoric. Its core prohibition is on the use of “improper means” to discover secret information.<sup>4</sup> “Improper” is a loaded term; it has a strong overtone of intrinsic wrongfulness, impropriety, of not behaving as one ought to. The Restatement (Third) of Unfair Competition explicitly defines “improper means” as those “either wrongful in themselves or wrongful under the circumstances.”<sup>5</sup> If the only idea at work were compliance with positive law, “tortious,” “prohibited,” or “infringing” would work just as well. If the only idea were utilitarian welfare maximization, “inefficient” or “wasteful” would be more apt. The choice of “improper” gives a hint that something else is afoot.

Courts use even stronger language. They regularly speak of “commercial morality” as a freestanding basis for protecting trade secrets.<sup>6</sup> “Piracy”—an ethically loaded term if ever there were one—is a frequent guest in trade secret opinions.<sup>7</sup> One of the major cases in the trade secret canon, *E.I. duPont deNemours & Co. v. Christopher*,<sup>8</sup> thunders, “We introduce here no new or radical ethic since our ethos has never given moral sanction to

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3. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).

4. See UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 437 (1990) (defining “misappropriation” in terms of using “improper means”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(a) (1995) (prohibiting use of “means that are improper”); RESTATEMENT (FIRST) OF TORTS § 759 (1939) (prohibiting use of “improper means”).

5. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 (1995).

6. See MILGRIM ON TRADE SECRETS § 13.03[2][b] (1992) (collecting cases and noting “interesting” use of “the normative ‘ought’ proposition”).

7. See, e.g., *Raytheon Co. v. Indigo Sys. Corp.*, No. 4:07-cv-109, 2008 U.S. Dist. LEXIS 70934, at \*6 (E.D. Tex. Sept. 18, 2008); *Wenner Media LLC v. N. & Shell N. Am. Ltd.*, No. 05 Civ. 1286 (CSH), 2005 U.S. Dist. LEXIS 1925, at \*13 n.7 (S.D.N.Y. Feb. 8, 2005); *Weissman v. Transcon. Printing U.S.A., Inc.*, 205 F. Supp. 2d 415, 425 (E.D. Pa. 2002); *Reed, Roberts Assocs. v. Strauman*, 353 N.E.2d 590, 593 (N.Y. 1976).

8. 431 F.2d 1012 (5th Cir. 1970).

piracy. The market place must not deviate far from our mores.”<sup>9</sup> This last quotation, though admittedly not typical, is telling: it explicitly subordinates concerns of the “market place” to “mores.”

This isn’t just empty talk. The substance of trade secret law is also readily explicable in ethical terms. The first major prong of improper means is breach of confidence. The ethical case against breach of confidence looks a lot like the ethical case against breach of contract. *Pacta sunt servanda*—promises carry with them an ethical obligation.<sup>10</sup> To break a promise of nondisclosure is to treat the promisee as a mere object, someone to be milked for information and then betrayed.<sup>11</sup> It’s wrongful in itself.

The same goes for the other major prong: espionage. The most common techniques of espionage are already prohibited as a matter of property and tort law. Breaking and entering, for example, is a freestanding tort and crime. If we assume the basic morality of law’s other basic commands, the conclusion that picking the lock on a back entrance is wrongful follows syllogistically. Even without the legal prohibition, it violates the ethical norm underlying property law: don’t touch what isn’t yours.<sup>12</sup> Other techniques of espionage involve an unhealthy curiosity about the affairs of others; the dumpster-diver is undignified because she’s engaged in a shameful act.<sup>13</sup>

Significantly, the ethical judgments involved are to be made with reference to “the *generally accepted standards* of commercial morality and reasonable conduct.”<sup>14</sup> Courts look to commercial customs to learn which practices are considered unethical.<sup>15</sup> The standards of conduct to which businesses will be held are ones that business people of reasonable ethical judgment could fairly be expected to discern.<sup>16</sup> You don’t need to go to law

9. *Id.* at 1016–17.

10. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 14–17 (1981).

11. See Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 CAL. W. L. REV. 209, 229–31, 243–44 (2006) (giving Kantian analysis of breach of promise of confidentiality).

12. See Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 619–27 (2008) (discussing relationship of the moral norm of inviolability to property law).

13. Cf. Harry Wingo, *Dumpster Diving and the Ethical Blindspot of Trade Secret Law*, 16 YALE L. & POL’Y REV. 195, 213–15 (1997) (considering dumpster-diving to be so self-evidently “sleazy” as to require no explication or justification).

14. RESTATEMENT (FIRST) OF TORTS § 757 cmt. f (1939) (emphasis added).

15. See Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 294–96 (1998) (criticizing use of industry custom in trade secret cases).

16. See, e.g., *Tennant Co. v. Advance Mach. Co.*, 355 N.W.2d 720, 723 (Minn. Ct. App. 1984) (reinstating punitive damage award against company whose president, “[w]hen asked whether he thought raiding the dumpster and rifling through a competitor’s trash was unethical, . . . equivocated by saying that he did not have enough information to make a judgment on those practices”).

school to know that sneaking into your competitor's plant with a forged ID badge is wrongful.

Trade secret, in short, has an ethical vision: competing businesses must be held to a minimum standard of fair and respectful conduct.<sup>17</sup> They ought not commit breaches of the peace in spying on each other; they ought not suborn each others' employees into faithless disloyalty. In many cases, this ethical vision is perfectly compatible with less obviously ethical arguments—the *Christopher* court, for instance, gives both economic and ethical reasons for its holding<sup>18</sup>—but the two are distinct.

Illustrating the difference, there are trade secret cases in which ethical arguments trump their competitors. In *Franke v. Wiltschek*,<sup>19</sup> for example, the U.S. Court of Appeals for the Second Circuit upheld an injunction against defendants who had falsely claimed to be interested in selling the plaintiff's compressed washcloths in order to obtain samples they could clone for their own competing washcloths.<sup>20</sup> It was undisputed, however, that the technical details of the plaintiff's washcloths weren't actually secret; they were visible both in the (publicly available) washcloths themselves, and in an expired patent.<sup>21</sup> The court didn't care.<sup>22</sup>

This move gives scholars fits; they argue that trade secret law serves no useful purpose unless its protections are denied to public information.<sup>23</sup> This disconnect shouldn't be surprising. Put yourself in a judge's shoes, looking at a defendant who has clearly behaved unethically and a plaintiff with clean hands. Now recall that the body of law you are to apply has an avowed purpose of preventing precisely this sort of unethical conduct. What reason is there not to step in?<sup>24</sup>

### B. Ethical Visions

This is what I mean when I refer to an “ethical vision” of intellectual property: a set of expectations about how people do and ought to behave in connection with an information good that are linked to a set of expectations about what the law does and ought to say. Many normative frameworks

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17. Cf. Don Wiesner & Anita Cava, *Stealing Trade Secrets Ethically*, 47 MD. L. REV. 1076, 1081 (1988) (arguing that courts in trade secret cases “are not overly analytical in their pursuit of the ethical issue, but they espouse ethical intentions”).

18. *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1015–17.

19. 209 F.2d 493 (2d Cir. 1953).

20. *Id.* at 494.

21. *Id.* at 500 (Frank, J., dissenting).

22. *Id.* at 495.

23. See, e.g., Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights* (Stanford Law Sch., John M. Olin Program in Law & Econ., Working Paper No. 358, 2008), available at <http://ssrn.com/abstract=1155167> (collecting and criticizing similar cases).

24. Cf. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1626–31 (2006) (arguing that “a finding of bad faith intent exerts excessive influence on the outcome of the multifactor test,” notwithstanding repeated judicial statements that it is only one factor among many).



make claims about what laws would be best.<sup>25</sup> An ethical vision also makes claims about what people should do beyond just “obey the law.” That is, it earns its name by speaking to the *ethics* of people’s actions.

That means scholars, lawmakers, and activists can use an ethical vision to make arguments about the ideal structure of law based on its view of ethics—or to make arguments about ethics based on the structure of law. These arguments often fit into well-known, standard forms familiar from other policy debates. These forms work with any kind of underlying normative theory, whether it be social welfare economics, democratic political theory, Rawlsian arguments from the original position, or what-have-you. They do the rhetorical work of connecting a set of principles with specific legal positions.

I’ll illustrate four such forms using the trade secret example and the facts of *Christopher*, the famous aerial photography case.<sup>26</sup> DuPont, the plaintiff, was building a plant to produce methanol using a secret process.<sup>27</sup> The defendants flew over the construction site, taking photographs.<sup>28</sup> DuPont sued, alleging that the overflight constituted improper means.<sup>29</sup> Significantly, the defendants’ conduct wasn’t otherwise illegal or tortious.

The process starts with *justification*, in which a set of normative principles is used to argue for a legal position to a legal actor with the authority to consider normative arguments directly. Thus, an activist might say to a state legislature, “This behavior is [\_\_\_\_\_], so the law ought to prohibit it.” The blank in this argument could be filled in with any sort of normative claim—for example, it’s commonly argued that allowing espionage gives businesses insufficient inducement to invest in creating valuable information.<sup>30</sup> The drafters of the Restatement (First) of Torts filled the blank by saying that in commercial matters there’s “a general duty of good faith and . . . liability rests upon breach of this duty.”<sup>31</sup> Put another way, they filled the blank in the form with an ethical claim: “This behavior is [*unethical*], so the law ought to prohibit it.”

When the *Christopher* court applied the Restatement’s test, it was engaged in *articulation*. Here, a legal actor is constrained to follow a legal rule supplied by some authority, and turns to normative arguments to aid in giving the rule content.<sup>32</sup> This pattern is common in statutory interpretation; the court asks what evils a law was intended to prevent and interprets the law consistently with that intention. Again, the possible

25. See, e.g., William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001).

26. *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1013 (5th Cir. 1970).

27. *Id.*

28. *Id.*

29. See *id.* at 1014.

30. See, e.g., Lemley, *supra* note 23.

31. RESTATEMENT (FIRST) OF TORTS § 757 cmt. a (1939). “Good faith” is another telling phrase that links commercial law to commercial morality, both doctrinally and rhetorically.

32. In *Christopher*, that authority was the Texas Supreme Court, which had adopted the Restatement’s rule. See *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 775 (Tex. 1958).

arguments an advocate might make are many, but they fit the form, “The [\_\_\_\_\_] goals of the law will be furthered by preventing this behavior.” The *Christopher* court referred to the overflight as a “school boy’s trick,”<sup>33</sup> “that which [the defendants] ought not do,”<sup>34</sup> and “devious[.]”<sup>35</sup> By treating these points as grounds for finding improper means, the court in essence filled in the form to read: “The [ethical] goals of the law will be furthered by preventing this behavior.”

Justification and articulation derive law from ethics. The process can also function in reverse, through *education*. On many ethical theories, there is at least a presumptive duty to obey the law; one learns the content of that duty by studying the law.<sup>36</sup> People learn important civic values, at least in part, by studying the law. Here, the argument takes the form, “Because this behavior violates the law, it’s [\_\_\_\_].” This point is implicit in *Christopher*. The defendants conceded that “other illegal conduct” would constitute improper means.<sup>37</sup> A per se rule that illegality implies impropriety is simply the filling in of this form to, “Because this behavior violates the law, it’s [unethical].”

Since not everyone agrees with these lessons, the cycle ends in *challenge*. Here, the gap between law and underlying principles is made explicit, and the gap is used as a rebuke to the law. If we really cared about economic efficiency, we wouldn’t have per se rules in antitrust law, if we really cared about democratic legitimacy, we would have stronger campaign-finance laws, and so on. This pattern takes the form, “This behavior isn’t [\_\_\_\_], so the law should be changed.” Robert G. Bone criticizes *Christopher* by arguing that its rule is unlikely to increase efficiency or improve fairness.<sup>38</sup> When I teach *Christopher*, some of my students simply don’t see anything wrongful about flying your own plane wherever you want, and think it an outrage that trade secret law prohibits it. Their argument fills in the form as, “This behavior isn’t [unethical], so trade secret law should be changed.” Of course, this challenge is just an inversion of the initial justification, so the cycle closes.

My point here isn’t to offer an extended theory of argument forms. It’s just to show that speaking this particular ethical rhetoric doesn’t require us to relearn our entire framework for making arguments about law. These familiar forms work perfectly well when filled in with ethical specifics. Of course, there are many kinds of ethical arguments. Utilitarian economics can supply an ethical argument: it tells us to do whatever maximizes social welfare. The Buddhist Eightfold Path, Hegelian personality theory, Aristotelian virtue theory: whatever your favorite ethical framework may be, it can be put to work using these forms.

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33. *Christopher*, 431 F.2d at 1016.

34. *Id.* at 1017.

35. *Id.*

36. See, e.g., LAWRENCE C. BECKER, RECIPROCITY 252–70 (1986).

37. *Christopher*, 431 F.2d at 1014.

38. See Bone, *supra* note 15, at 297–98.

### C. *This Particular Ethical Vision*

In this section, we narrow our focus again, and I want to be clear that we're doing so, not because other approaches are necessarily wrong, but merely because the one we zoom in on here is particularly interesting. We've already zoomed in from general normative arguments to ethical ones, and now we look at one particular kind of ethical vision. We do so here by isolating some interesting features of the ethical vision in our trade secret example.

The first thing to notice is that the vision's condemnation of espionage and breach of confidence is *deontic*,<sup>39</sup> not consequentialist.<sup>40</sup> The reasoning focuses on the intrinsic qualities of the act and on the ethical qualities displayed by the person who engages in it, rather than on the outcomes that it leads to. Breaking and entering is wrong in itself, and ordinary business people can be expected to recognize that fact without needing to make lengthy consequentialist analyses. Breaking your promise to treat someone else's information as confidential means failing to treat that person with the respect properly owed to another moral agent; the analysis can stop there.

The second thing to notice is that your duty not to misappropriate trade secrets is *relational*; it's really a duty to the secret's holder because of some ethically relevant relationship between you and her. It isn't that the trade secret owner has acquired an ethical right to make demands upon the world by virtue of having created the secret. Instead, you're under a relational ethical duty not to do certain disrespectful things to her. The misappropriation of a trade secret is merely a measure of harm, and sometimes the threshold that makes those disrespectful things legally actionable. It's important to specify the relevant relationships. For breaches of confidence, the relationship is direct: it's contractual or quasi-contractual. For espionage, the relationship is oriented toward respect for privacy and for property.<sup>41</sup> More broadly, trade secret's obligations are duties owed by competitors to each other because of their relationship as competitors.

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39. I use "deontic" rather than "deontological" in keeping with this essay's focus on ethics rather than metaethics. I'm not primarily concerned with the validity of these ethical claims or with the history of studying them, for which the "-ology" suffix would be appropriate. I use "consequentialist" rather than "teleological" for similar reasons.

40. "Consequentialist" shouldn't be mistaken for "utilitarian" or "economic," even though both are familiar examples of consequentialist approaches. Scholars argue bitterly over whether economics can properly describe all the goods that make people better-off, or whether law should improve distributional fairness at the expense of utilitarian social welfare. These arguments—on both sides—are essentially consequentialist. This essay stands aside from these debates; the deontic ethical arguments it analyzes part company with consequentialist ones well before the latter ramify into distributional/utilitarian and economic/noneconomic forms.

41. Note, for example, the enormous legal difference between photographing a device in a competitor's factory and reverse engineering a device sold on the open market. It may be the same device, but one's relationship to an owner imposes more obligations than one's relationship to a nonowner.

Third, there's a way in which one's duties regarding trade secrets are *reciprocal*. Obviously someone with a trade secret and someone with a duty to respect it don't stand in a symmetrical relationship. But there is a broader claim that competing businesses owe reciprocal obligations to each other to respect trade secrets. Note also the explicit element of reciprocity in breach of confidence theories; the person under the duty of confidentiality has received something—access to secret information—in return for which it's appropriate to place them under a corresponding obligation. Lawrence C. Becker would call this return “fitting”: one returns something appropriate, not necessarily the same thing.<sup>42</sup>

These three adjectives—deontic, relational, and reciprocal—characterize the ethical vision of trade secret discussed above. Putting them all together, we might say that trade secret law domesticates competition. Free-for-all competition has the potential to be a dangerous, destructive force in which competitors tear each other apart. Thus, trade secret law—as part of the larger body of “unfair” (a word with significant moral overtones) competition law—sets limits beyond which ethical businesses should not go.

But note the positive component of this vision: there *is* a space of positive, ethical competition. Trade secret law is as much about businesses behaving well as it is about businesses behaving badly. When they respect each others' fences and keep their confidences, businesses are acting ethically. To repeat, this is the fundamental point of an ethical vision: it yokes the law's prohibitions to a model of how those regulated by the law could and should behave. Now that we have this point clearly in mind, we're ready to look for ethical visions elsewhere in intellectual property law.

## II. THE DEFAULT ETHICAL VISION OF COPYRIGHT LAW

The basic ethical expectation of copyright is that authors and audiences respect each other and meet in the marketplace. Authors behave well when they create and offer works that enrich the audience's intellectual and cultural lives. Audiences behave well when they offer authors the financial support needed to engage in creative work. The exchange is commercial, voluntary on both sides, reciprocal, and respectful. I call this the “default ethical vision” of copyright, and this part describes two kinds of evidence for it: the structure of the Copyright Act, and the way that courts sometimes reason in copyright cases.

### A. Structure

The structure of the Copyright Act of 1976 is simple. It vests copyright in authors<sup>43</sup> and gives them exclusive rights to control specified uses of

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42. BECKER, *supra* note 36, at 107–11.

43. See 17 U.S.C. §§ 102(a), 201(a) (2006).

their works.<sup>44</sup> It then contemplates that authors will license certain of these uses,<sup>45</sup> distribute physical copies of the work, or both.<sup>46</sup> The Copyright Act doesn't explicitly require that these transactions be commercial, but it clearly has commerce in mind. The first fair use factor distinguishes commercial from noncommercial uses, and the fourth requires consideration of the effect on the market.<sup>47</sup> Both direct courts to preserve the author's ability to market her work. Many provisions of the Act condition eligibility for an exception on noncommercial use;<sup>48</sup> some of the 1909 Act's exclusive rights were explicitly defined in terms of "vend[ing]" or use "for profit."<sup>49</sup>

The central idea here is that authors, having created original works, will sell access to them. Since every transaction has two sides, we might also say that audiences will ordinarily buy access. The center of this vision is market exchange at a fair price; it's fair because it was freely agreed upon. This is a classic liberal vision of commerce: autonomy and fair dealing go together to create exchanges of mutual advantage. The copyright angle is that authors and audiences each have something distinct to offer: authors have their originality, and audiences have the money to pay for it. The author-audience relationship is central to this vision.

Obviously, both sides are paying each other the respect of negotiating in good faith, rather than just trying to grab and run.<sup>50</sup> But this positive view of commerce is also compatible with a richer, ongoing form of respect. It treasures the feeling of connectedness that fans feel toward their favorite musicians, just as it treasures writers' willingness to write books that their fans want to read. These emotional connections make the actual purchase of copies into a more deeply ethical act, one in which both sides are properly attuned to each others' wants and needs. Money is the medium of exchange, but the exchange isn't reducible to purely monetary terms.

Other elements of the copyright system are compatible with this vision, which focuses on mutuality, respect, and fairness in author-audience copyright transactions. The termination of the transfers system (like the system of renewal rights before it) rests on the idea that some authors' genius won't be fully appreciated at the time of their initial creation.<sup>51</sup> By letting them recapture their copyrights decades later, these provisions

44. *See id.* § 106. I omit the United States' limited moral rights scheme, *id.* § 106A, from this description.

45. *See id.* § 106(4)–(6) (giving exclusive public performance and display rights); 101 (distinguishing "transfer of copyright ownership" from a "nonexclusive license").

46. *See id.* §§ 106(3) (giving exclusive public distribution right); *id.* § 109 (contemplating that persons other than the copyright owner could become owners of copies); *id.* § 202 (distinguishing transfer of rights in the copy from transfer of the copyright).

47. *Id.* § 107(1), (4).

48. *E.g., id.* §§ 108(a)(1), 110(4), 110(5)(A), 110(10), 114(f)(5)(A), 118.

49. *Id.* § 1 (repealed 1976).

50. The Copyright Act even explicitly protects copyright owners from involuntary expropriation, albeit at the hands of government, rather than private parties. *See id.* § 201(e).

51. *See id.* §§ 203, 304.

enable authors to renegotiate deals based on the “real” level of interest in their works. The theory is economically suspect, but ethically intuitive.<sup>52</sup>

Similarly, many of the exceptions spelled out in the detailed sections of the 1976 Copyright Act work to the benefit of specified institutions with clear ethical goals: libraries,<sup>53</sup> public broadcasters,<sup>54</sup> and teachers.<sup>55</sup> The exceptions are carefully circumscribed, but they do tend to favor institutions capable of “paying” for their uses with some of their capital of integrity and respect. (One might think of some of these exceptions as a kind of presumption: a *good* author would spend a little time volunteering at the library.) Copyright misuse protects against overreaching authors who see their audiences only as money pots to be emptied, rather than as real people with a legitimate interest in receiving the work on fair terms.<sup>56</sup> U.S. government works are ineligible for copyright protection; the vision of marketplace exchange simply doesn’t fit with the relationship between government and citizen.<sup>57</sup>

### B. Rhetoric

When deciding copyright cases, courts sometimes use language suggestive of the default ethical vision. Take the *Bleistein*<sup>58</sup> nondiscrimination principle: that the sole measure of quality in copyright law is the market’s willingness to pay. In the Court’s words, “Yet if they command the interest of any public, they have a commercial value[]—it would be bold to say that they have not an aesthetic and educational value[]—and the taste of any public is not to be treated with contempt.”<sup>59</sup> This approach foregrounds and validates voluntary author-audience exchange for money; it claims that the sale of copies of copyrighted works is both normal and good.

The famous ambiguities of and arguments over fair use also show the role of the default ethical vision. The name itself—*fair* use—is suggestive. Some courts explicitly consider the defendant’s bad faith (for example, in copying from a stolen manuscript).<sup>60</sup> Some scholars argue that proper

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52. Compare Tom W. Bell, *Authors’ Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 252–53 (2003) (“[T]ermination rights aim to correct the sorts of bad bargains that struggling authors make in desperation and, after later success, come to regret.”), with *id.* at 253 n.141 (“We might well question whether termination rights in fact help an author.”).

53. 17 U.S.C. § 108.

54. *Id.* § 118.

55. *Id.* § 110(1).

56. See *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 972–79 (4th Cir. 1990).

57. See 17 U.S.C. § 105.

58. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

59. *Id.* at 252.

60. See, e.g., *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478–79 (2d Cir. 2004) (discussing weight to be placed on finding of bad faith).

attribution is a form of respect whose presence should favor the defendant,<sup>61</sup> or whose absence should hurt.<sup>62</sup>

Or consider parody. A stinging parody is sympathetic from a free speech point of view, but is it any wonder that judges steeped in a vision of respect for authors would find such uses unacceptable in terms as much ethical as economic? The reversed district court opinion in *SunTrust Bank v. Houghton Mifflin Co.*<sup>63</sup> referred to the defendant's parody of *Gone With the Wind* as "unabated piracy."<sup>64</sup>

This condemnatory trend is particularly evident in fair use cases where the use is disreputable. Another court enjoined the use of the "Mickey Mouse March" in a pornographic film, stating the use "in the setting provided is such as to *immediately compromise* the work."<sup>65</sup> Another enjoined the use of a Super Stud singing telegram costume, in part, because its "bawdy associations . . . tarnishe[d] the 'all-American' image that [the copyright owner in Superman] has labored to create and to preserve."<sup>66</sup> These courts treat vulgar parodic uses as unworthy of fair use defenses precisely because they have the temerity to knock an iconic original from its cultural pedestal.<sup>67</sup>

The debates over sampling show how ethical arguments about respect can be made on both sides of the equation. Take the opening of *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*:<sup>68</sup>

"Thou shalt not steal." has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.<sup>69</sup>

61. See, e.g., Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 84–88 (2007) (proposing attribution as a fifth fair use factor).

62. See, e.g., Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 51–90 (1997) (giving nonconsequentialist argument that the moral right to attribution should override fair use concerns).

63. 136 F. Supp. 2d 1357 (N.D. Ga. 2001).

64. *Id.* at 1369.

65. *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975) (emphasis added).

66. *DC Comics Inc. v. Unlimited Monkey Bus., Inc.*, 598 F. Supp. 110, 118 (N.D. Ga. 1984).

67. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) ("We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute *dirty* lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." (emphasis added)). But see Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273, 275–91 (2007) (arguing that modern courts have been more willing to find that sexualization makes a work transformative for fair use purposes).

68. 780 F. Supp. 182 (S.D.N.Y. 1991).

69. *Id.* at 183 (quoting *Exodus* 20:15).

This Puritanical fervor, singularly unreceptive to the idea that sampling might ever be anything other than a form of theft, isn't explicable on purely economic terms.<sup>70</sup> But on the other side, commentators play the respect card when defending remix artists, whose collage-like creativity is said to show a profound respect for the sources on which they draw.<sup>71</sup>

My favorite example of the powerful hold on the imagination that this vision of a respectful author-audience relationship has comes from *Warner Bros. Entertainment Inc. v. RDR Books*,<sup>72</sup> the *Harry Potter Lexicon* case. Courtroom viewers were treated to the remarkable spectacle of both plaintiff and defendant in or near tears on the witness stand.<sup>73</sup> Both felt acutely the loss of a valued, respectful relationship: the plaintiff because her role as authoritative author was being usurped, and the defendant because his attempt to provide a loving tribute was being rebuffed. The intensely personal nature of the trial is a testament to the power of the default ethical vision to shape both sides' perception of what was at stake.

### III. ETHICAL VISIONS IN ACTION

It's now possible to examine the rhetorical work this ethical vision does on the front lines of the copyright wars. This part looks at four clusters of arguments made about the scope of the contemporary copyright. Each cluster engages with the default ethical vision, but in an interestingly different way. Educational campaigns by copyright industry associations urging the public to "respect copyrights" embrace it unproblematically. Surprisingly, so does the EFF's call that the record companies should stop "suing their customers"; the moral authority of this argument depends on the default ethical vision. On the other hand, when free software advocates argue that "software should be free," they reject central premises of the default vision. Finally, the "I love to share" rhetoric associated with Creative Commons is interestingly ambiguous in its attitude toward it. This part takes up these rhetorical clusters in turn.

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70. Cf. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799–805, 801 n.12 (6th Cir. 2005) (offering economic argument against sampling, but falling back on *Grand Upright's* "Thou shalt not steal" language in a footnote).

71. See, e.g., Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, LAW & CONTEMP. PROBS., Spring 2007, at 135, 159–60.

72. 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

73. See Anemona Hartocollis, *Sued by Harry Potter's Creator, Lexicographer Sobs on Stand*, N.Y. TIMES, Apr. 16, 2008, at B1.



## A. "Respect Copyrights"

Over the past two decades, the music,<sup>74</sup> movie,<sup>75</sup> and software<sup>76</sup> industries have devoted increasing resources to educating the public about copyright law.<sup>77</sup> The Software Publishers Association's 1992 video "Don't Copy That Floppy," which warned kids not to copy computer games for each other, was an early example of the genre.<sup>78</sup> More recently, the Business Software Alliance (BSA) has sponsored a comic book featuring "Garret the Ferret," who teaches kids to ferret out piracy.<sup>79</sup> Meanwhile, the Motion Picture Association of America (MPAA) and the RIAA have taken their messages both to mass media<sup>80</sup> and to the classroom.<sup>81</sup>

These educational campaigns recycle a few rhetorical tropes over and over; they fit snugly into the default ethical vision. Start with the recurring language of "respect." The MPAA's campaigns, for a time, used the umbrella brand "Respect Copyrights."<sup>82</sup> Not "obey" copyright law, not "follow the law," but "respect"—a term with a strong overtone of dignity and virtuous regard for others. The MPAA collaborated with the Los Angeles area Boy Scouts to offer a "Respect Copyrights" activity patch.<sup>83</sup> "Don't Copy That Floppy" told kids that unauthorized copying is "disrespectin' all the folks who are makin' it," whereas when you pay for software, "you're sayin' to the team / you respect what you do and what you're workin' for."<sup>84</sup>

This claim about respect fits hand-in-glove with the way the video humanizes authors by intercutting video clips of software professionals

74. See generally Recording Industry Association of America, Tools for Parents and Educators, <http://www.riaa.com/toolsforparents.php> (last visited Mar. 24, 2009).

75. See generally Motion Picture Association of America, Anti-piracy, <http://www.mpaa.org/piracy.asp> (last visited Mar. 24, 2009).

76. See generally Business Software Alliance, Anti-piracy: Educate Others, <http://www.bsa.org/country/Anti-Piracy/Educate%20Others.aspx> (last visited Mar. 24, 2009); Entertainment Software Association, Anti-piracy, <http://www.theesa.com/policy/antipiracy.asp> (last visited Mar. 24, 2009); Software & Information Industry Association, Anti-Piracy: Educational Materials, <http://www.siiia.net/piracy/education.asp> (last visited Mar. 24, 2009).

77. See generally Tarleton Gillespie, *Characterizing Copyright in the Classroom: The Cultural Work of Anti-piracy Campaigns*, 2 COMM., CULTURE, & CRITIQUE (forthcoming 2009).

78. Don't Copy That Floppy (Software Publishers Association 1992), available at <http://video.msn.com/video.aspx?mkt=en-us&vid=5d371d69-ecc8-4c97-86b0-510abc7b9718>.

79. Business Software Alliance, Copyright Crusader to the Rescue (Jan. 14, 2005), available at <http://www.playitybersafe.com/pdfs/Curriculum-CC-2005.pdf>.

80. See, e.g., Brad King, *Disney's Peer-to-Peer Pressure*, WIRED, Oct. 24, 2001, <http://www.wired.com/techbiz/media/news/2001/10/47806> (TV show episode); *Record Breaker*, ARCHIE, no.577 (July 2007) (comic book).

81. See Gillespie, *supra* note 77.

82. See Respect Copyrights, <http://www.respectcopyrights.com> (last visited Mar. 24, 2009).

83. David Pierson, *A Merit Badge that Can't Be Duplicated*, L.A. TIMES, Oct. 21, 2006, at B1.

84. See Don't Copy That Floppy, *supra* note 78.

talking about their work with the rap.<sup>85</sup> The “Movies. They’re Worth It” videos created by the MPAA and shown before theatrical trailers featured a set painter and a stuntman speaking directly to the camera about the pride they take in their work and how unauthorized copying of movies threatens their jobs.<sup>86</sup> It’s both an emotional appeal to one’s instinctive sense of reciprocity and an ethical claim about the identifiable moral agents toward whom one stands in a meaningful relationship. Other campaigns ask the audience to imagine themselves in an author’s shoes, or to imagine that they’ll someday mature into being authors themselves.<sup>87</sup>

The mirror image of this foregrounding of authors is the way these campaigns simultaneously efface any participation by publishers, distributors, and other middlemen. These middlemen may play an economically important role in the copyright system, but they’re not ethically salient. As A. O. Scott put it when writing about Manny the stuntman, “The people most visibly associated with the movie business—the studio executive with a house in the Hollywood Hills, the movie star with a \$12 million price tag and a first-look production deal—might not elicit much sympathy.”<sup>88</sup>

Perhaps more surprisingly, these campaigns also recognize a kind of reciprocity in the author-audience exchange. They validate fandom and encourage enthusiasm about copyrighted works: as “Don’t Copy That Floppy” puts it, “I know you love the game and that’s okay to do.”<sup>89</sup> The point of the campaigns is to channel that fandom into commercial channels and away from uncompensated sharing. One RIAA poster explains, “True music fans play by the rules.”<sup>90</sup> There’s a positive vision of exchange here alongside the negative anti-infringement one. Note that this vision, however, depicts audiences in “[t]he traditional role of consumer, active in its zeal but passive in terms of subsequent creation or even interpretive defiance.”<sup>91</sup>

Now let’s complete the ethical vision by bringing law into the picture. Take an MPAA announcement from the start of some DVDs: “You wouldn’t steal a car. . . . You wouldn’t steal a handbag. . . . You wouldn’t steal a television. . . . You wouldn’t steal a movie. . . . Downloading pirated films is stealing. . . . Stealing is against the law. . . . Piracy. It’s a crime.”<sup>92</sup> On this version of the story, copyright law unproblematically reflects the

85. *Id.*

86. See A. O. Scott, *These Are Your Movies on Piracy*, N.Y. TIMES, Nov. 16, 2003, § 2, at 15.

87. Gillespie, *supra* note 77, at 23.

88. Scott, *supra* note 86.

89. Don’t Copy That Floppy, *supra* note 78.

90. Recording Industry Association of America, Music Rules!, *available at* <http://www.music-rules.com/pdf/MusicRulesPoster.pdf>.

91. Gillespie, *supra* note 77, at 44.

92. Piracy: It’s a Crime (Motion Picture Association of America 2004), *available at* <http://www.youtube.com/watch?v=HmZm8vNHBSU>. See generally Patricia Loughlan, “You Wouldn’t Steal a Car”: *Intellectual Property and the Language of Theft*, 29 EUR. INTEL. PROP. REV. 401 (2007).

ethics of the default vision. Downloading is wrong, and it's illegal, and there's no daylight between "wrong" and "illegal," in either direction.<sup>93</sup> The argument is simultaneously justification and education. The same could be said of the strongly moralistic tone that came to characterize Jack Valenti's long anti-piracy crusade.<sup>94</sup> Copyright was worthy of respect because it was the law, and copyright was the law because creators deserve respect.

And finally, in slogans like "Movies. They're worth it," the campaigns push the line that a price tag tells you that what you're getting is worth it. Another MPAA campaign aimed at middle school students told them, "If you don't pay for it, you've stolen it."<sup>95</sup> These slogans conjoin three claims: anything you get for free must be (a) no good (a factual claim), (b) cheating an artist (an ethical claim), and (c) illegal (a legal claim).<sup>96</sup> The last is an example of articulation from the default ethical vision. The equation of free and illegal is obviously false in a world of fair use and commercial pirates, but it makes sense in an ethical framework of marketplace exchange.

The default ethical vision, thus, tells a potentially compelling story about copyright and media. By deploying it, the media industries are able to make powerful ethical arguments in support of their legal and educational claims. For reasons that should now be clear, they tend to embrace the default vision uncritically. But their view of it is hardly the only possible one.

### B. "Don't Sue Your Customers"

So far, it may seem as though the default ethical vision cuts only one way: in favor of expansive copyright claims by authors. But when authors flex their legal muscle, something very interesting happens: it becomes possible to turn the default ethical vision against them. To see how, consider some of the rhetoric used in response to the RIAA's litigation campaign against individual file sharers.

Five years into that campaign, the EFF released a report with the provocative title "RIAA v. The People."<sup>97</sup> That's also the name of an anti-RIAA blog run by attorney Ray Beckerman, who represents many file-sharing defendants.<sup>98</sup> This isn't an actual legal caption: technically, the corporate members of the RIAA are the plaintiffs, and the defendants are

93. See also Gillespie, *supra* note 77.

94. See, e.g., Jack Valenti, Frey Lecture in Intellectual Property, Duke Law School: Comments on the Moral Imperative (Feb. 24, 2003), available at <http://www.law.duke.edu/webcast/?match=Frey+Lecture+in+Intellectual+Property>.

95. See Kathleen Sharp, *Laying Down Copyright Law—To Children*, BOSTON GLOBE, Apr. 25, 2004, at A19.

96. See Gillespie, *supra* note 77, *passim*.

97. ELEC. FRONTIER FOUND., RIAA v. THE PEOPLE: FIVE YEARS LATER (2008), available at <http://www.eff.org/files/eff-riaa-whitepaper.pdf>.

98. See Recording Industry vs. The People, <http://recordingindustryvspeople.blogspot.com> (last visited Mar. 24, 2009).

individuals. But at 30,000 lawsuits and counting,<sup>99</sup> the name captures something important about the litigation, and tweaks it in a propagandistically effective way. It's a piece of clever counter-articulation: an argument is that the RIAA is using its legal rights in a manner inconsistent with the ethical vision underlying those rights.

Let's look at some of the rhetorical tropes involved. First, anti-RIAA advocates humanize their position by pointing to particularly sympathetic targets of the litigation campaign: twelve-year-olds,<sup>100</sup> computer-illiterate grandmothers,<sup>101</sup> the homeless,<sup>102</sup> transplant patients,<sup>103</sup> and the dead.<sup>104</sup> This may or may not be a financially sensible litigation strategy,<sup>105</sup> but it has been a public-relations disaster. Downhill Battle, a nonprofit advocacy group, gave out stickers telling consumers not to buy CDs that "[f]und [l]awsuits [a]gainst [c]hildren and [f]amilies."<sup>106</sup>

Similarly, these campaigns use audiences' status as "fans" to provide moral authority. The group Prince Fans United formed to resist copyright claims by the artist once again known as Prince,<sup>107</sup> or, in their words, "to fight back to what amounts to an *injustice* to the fansites and the very *fans* who have *supported* Prince's *career*, many since the very beginning nearly thirty years ago."<sup>108</sup> Here, their long and passionate commercial engagement with Prince is presented as the source of their ethical claim against him. At other times, the rhetoric of fandom is deployed to excuse file sharers, whose only "crime" is loving music too much. As the EFF asks, "Tired of the entertainment industry treating you like a criminal for wanting to share music and movies online?"<sup>109</sup>

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99. See ELEC. FRONTIER FOUND., *supra* note 97, at 1.

100. See Sam Diaz, *Recording Industry in a Bind*, SAN JOSE MERCURY NEWS, Sept. 15, 2003, at 1E.

101. See Benny Evangelista, *Download Lawsuit Dismissed: RIAA Drops Claim that Grandmother Stole Online Music*, S.F. CHRON., Sept. 23, 2003, at B1.

102. See Warner Bros. Records, Inc. v. Berry, No. 07 Civ. 1092(HB)(KNF), 2008 WL 1320969, at \*4 n.1 (S.D.N.Y. Apr. 8, 2008).

103. See *Teen Transplant Candidate Sued over Music Downloads*, WTAE-TV, Dec. 1, 2008, <http://www.thepittsburghchannel.com/news/18160365/detail.html>.

104. See Recording Industry vs. The People, <http://recordingindustryvspeople.blogspot.com/2006/08/riaa-wants-to-depose-dead-defendants.html> (Aug. 13, 2006, 9:25 PM).

105. Compare Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133 (2006) (stating that lawsuits are cost-justified), with Eric Bangeman, *RIAA Anti-P2P Campaign a Real Money Pit, According to Testimony*, ARS TECHNICA, Oct. 2, 2007, <http://arstechnica.com/news.ars/post/20071002-music-industry-exec-p2p-litigation-is-a-money-pit.html> (stating that lawsuits are a money-losing proposition).

106. See Scott Kirsner, *Downhill Battle Wages Uphill Fight vs. Music Industry*, BOSTON GLOBE, Jan. 10, 2005, at C1.

107. See Mireya Navarro, *Pout and Shout*, N.Y. TIMES, Dec. 2, 2007, § 9, at 1.

108. See Press Release, Prince Fans United, Prince Fans Fight Back Against Attacks (Nov. 5, 2007), available at [http://www.princefansunited.com/pfu\\_press\\_release.pdf](http://www.princefansunited.com/pfu_press_release.pdf) (emphasis added).

109. Electronic Frontier Foundation, File Sharing, <http://www.eff.org/issues/file-sharing> (last visited Mar. 24, 2009).

In addition to innocents and fans, these campaigns also describe audiences as “customers.” The EFF calls the recording industry’s lawsuits “an unprecedented legal campaign against its own customers”<sup>110</sup> and has been using variants of this phrase—especially “suing your customers”—for years.<sup>111</sup> That’s an interesting choice of words; being a “customer” doesn’t ordinarily give one a special ethical claim not to be sued.<sup>112</sup> But it makes sense in terms of the default ethical vision, which prizes commercial exchange. By depicting audiences as “customers,” it’s possible to make an argument that they’re carrying out their side of this particular ethical bargain.

There’s also a closely related claim that audiences remain ready to pay for music on fair terms. As the EFF says, “Music fans today deserve the same opportunity to pay a fee for the freedom to download the music they love.”<sup>113</sup> Thus, the EFF’s “better way forward”—voluntary collective licensing—is, in essence, a request to authors to return to the bargaining table and negotiate in good faith for a different arrangement that would let audiences continue to express their appreciation for creators’ works, albeit with a different financial channel back to creators.<sup>114</sup> The EFF emphasizes both that the arrangement should be voluntary and that audiences would pay if terms were fair.<sup>115</sup> Similarly, many calls for new business models for musicians aren’t just claims about the economics of music;<sup>116</sup> they also uphold a positive vision of mutual enthusiasm in which the musician and the audience feed off of each other’s energy.<sup>117</sup>

Meanwhile, these campaigns foreground and excoriate the record industry.<sup>118</sup> Consider complaints about record industry price-fixing, a

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110. Electronic Frontier Foundation, *RIAA v. The People*, <http://www.eff.org/riaa-v-people> (last visited Mar. 24, 2009).

111. See, e.g., Katie Dean, *RIAA Sues 80 More Swappers*, WIRE, Oct. 30, 2003, <http://www.wired.com/entertainment/music/news/2003/10/61028> (quoting EFF attorney Fred von Lohmann as saying, “Suing your customers one at a time is not a business model.”); see also G. Richard Shell, *Suing Your Customers: A Winning Business Strategy?*, KNOWLEDGE@WHARTON, Oct. 22, 2003, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=863>; Fred von Lohmann, *Is Suing Your Customers a Good Idea?*, LAW.COM, Sept. 29, 2004, <http://www.law.com/jsp/article.jsp?id=1095434496352>.

112. Indeed, stores prosecute shoplifters all the time, and the obvious rejoinder is precisely that downloaders are being sued precisely because they’re not being “customers,” but are instead helping themselves for free. But notice how this rejoinder itself concedes the illegitimacy of suing actual customers.

113. See ELEC. FRONTIER FOUND., *supra* note 97, at 14.

114. See FRED VON LOHMANN, ELEC. FRONTIER FOUND., *A BETTER WAY FORWARD: VOLUNTARY COLLECTIVE LICENSING OF MUSIC FILE SHARING* (2008), available at <http://www.eff.org/files/eff-a-better-way-forward.pdf>.

115. *Id.*

116. See, e.g., Chris Anderson, *Free! Why \$0.00 Is the Future of Business*, WIRE, Feb. 25, 2008, [http://www.wired.com/techbiz/it/magazine/16-03/ff\\_free?currentPage=all](http://www.wired.com/techbiz/it/magazine/16-03/ff_free?currentPage=all).

117. See Clive Thompson, *Sex, Drugs and Updating Your Blog*, N.Y. TIMES, May 13, 2007, § 6 (Magazine), at 42 (calling online author-audience relationship “symbiotic”).

118. See, e.g., Danny Colligan, *RIAA = Evil*, GEO. INDEP., Mar. 28, 2007, <http://media.www.thegeorgetownindependent.com/media/storage/paper136/news/2007/03/28/Commentary/Riaa-Evil-2808823.shtml>.

practice that visibly undermines the voluntary bargaining at the heart of the default ethical vision.<sup>119</sup> Or consider some of the arguments against digital rights management (DRM). It spies on users;<sup>120</sup> it misuses their computers.<sup>121</sup> Both are inconsistent with respect for user autonomy; neither is part of the core money-for-access trade envisaged by the default vision. Every time a music retailer shuts down and turns off its DRM server, it's withdrawing unilaterally from what should have been a long-term respectful relationship.<sup>122</sup>

Vilifying the record industry has another rhetorical benefit. By portraying the record companies as intermeddling usurpers and musicians as additional victims of this heartless cartel, groups like Downhill Battle can depict the struggle against industry lawsuits as consistent with the larger vision of author-audience collaboration.<sup>123</sup> As Courtney Love puts it, "What is piracy? Piracy is the act of stealing an artist's work without any intention of paying for it. I'm not talking about Napster-type software. I'm talking about major label recording contracts."<sup>124</sup>

The trickiest piece of the argument to finesse is the lawsuits themselves. After all, it's inherent in modern copyright law that copyright owners have the right to bring suit against infringers. Some activists engage in critique: if the law allows lawsuits against fans, the law is an ass.<sup>125</sup> Others, like Beckerman, engage in articulation, seeking to use these ethical principles as anchors for convincing legal arguments.<sup>126</sup> Still others, like the EFF, make their appeal directly to copyright owners: even if you have a legal right to do it, what you are doing is wrong, and you should stop. The default ethical vision, with its positive vision of the author-audience relationship, is the ethical baseline from which all of these claims start. Note, by way of

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119. See, e.g., Nate Anderson, *Class Action Lawsuit Filed Against Music Industry*, ARS TECHNICA, Mar. 13, 2006, <http://arstechnica.com/news.ars/post/20060313-6368.html>; see also 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, 519 (2002).

120. See Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996).

121. See generally Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L.J. 1157 (2007) (discussing unknowingly installed software).

122. See, e.g., Posting of Cory Doctorow to BoingBoing, <http://boingboing.net/2008/09/26/walmart-shutting-dow.html> (Sept. 26, 2008, 8:34 PM) ("Well, they're repaying your honesty by taking away your music.").

123. See Downhill Battle Presents the Reasons, <http://www.downhillbattle.org/reasons/> (last visited Mar. 24, 2009).

124. Courtney Love, Speech at the Digital Hollywood Online Entertainment Conference (May 16, 2000), available at <http://archive.salon.com/tech/feature/2000/06/14/love/>.

125. See, e.g., Jon Lebkowsky, *The Pirate Party: Rethinking Copyright*, WORLDCHANGING, Aug. 22, 2006, <http://www.worldchanging.com/archives/004848.html> (describing Pirate Party of Sweden, which believes that all noncommercial copying should be legal).

126. See, e.g., Ray Beckerman, *Large Recording Companies v. The Defenseless: Some Common Sense Solutions to the Challenges of the RIAA Litigations*, JUDGES' J., Summer 2008, available at <http://www.abanet.org/jd/publications/jjournal/2008summer/Beckerman.pdf>.

contrast, that almost no one contests the legitimacy of actions against unlicensed CD pressing plants.

The overall vision of copyright law here, therefore, is that copyright law is being abused by copyright owners seeking unfair domination over audiences. Despite all that, the basic deal—money for creative works—is sound and remains an ethical ideal. The business models and the specifics of copyright law will need to be tweaked, but they can be.

Thus, the RIAA's rhetoric and the EFF's rhetoric have more in common than one might expect. They both largely accept the default ethical vision of copyright: an ideal frame of mutual respect, fair dealing, and commercial exchange. Neither contests that each side owes the other some obligations, and they both agree that copyright law should act to implement this ethical vision. Where they part company is in where they assign blame for its breakdown: each side blames the other for not negotiating in good faith. The default ethical vision is flexible enough to be compatible with both stories.

Isn't this just the continuation of negotiation by other means? Creators and consumers would each like to adjust the terms of their relationship to favor themselves, and will turn to whatever rhetorical tools come to hand. Yes, but notice that in these disputes, both sides accept that there *is* a contract whose general outlines are clear. This isn't crazy talk; it fits with how people think about creative works in everyday life. You feel good about buying music from a band you like; you hope that they feel appreciated. That sense of reciprocity doesn't just drive people's behavior; it also drives the law.

### C. "Software Should Be Free"

There are more radical critiques out there, the most famous of which is associated with the free software movement.<sup>127</sup> Free software ideology is complex and contested, so I focus on Richard Stallman, the founder of the Free Software Foundation (FSF) and leading free software advocate. Stallman's frustration with a buggy printer he could not patch because Xerox would not make the necessary source code available turned into a personal crusade for user rights.<sup>128</sup> He and the FSF are now the center of both a large and diffuse community of programmers and of a politically active social movement. Stallman's initial critique was limited to software;<sup>129</sup> he subsequently expanded it to include software manuals;<sup>130</sup>

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127. Here, I particularly wish to emphasize that I'm describing rhetorical clusters. There are allegedly as many views of free software as there are free software developers. I'm describing features that much of their rhetoric has in common, rather than claiming that I'm depicting a complete and coherent set of claims made by any particular institution.

128. See generally SAM WILLIAMS, *FREE AS IN FREEDOM: RICHARD STALLMAN'S CRUSADE FOR FREE SOFTWARE* (2002).

129. See Richard Stallman, GNU Project, *Why Software Should Be Free* (Apr. 24, 1992), <http://www.gnu.org/philosophy/shouldbefree.html>.

other activists have extended it to nonfunctional, expressive works.<sup>131</sup> Let's examine a few of the rhetorical and ethical moves that lead them all to reject the default ethical vision of copyright.

The first, basic claim is that user rights over software are a matter of "freedom." In the FSF's famous formulation, "Free software is a matter of liberty, not price. To understand the concept, you should think of free as in free speech, not as in free beer."<sup>132</sup> This rhetorical orientation links free software to liberal values<sup>133</sup> and gives it an explicitly ethical tone missing from talk of "open source."<sup>134</sup> On this story, individual autonomy is a fundamental value, and it requires control over the software one runs on one's own computer.<sup>135</sup> You need to be able to choose which software to run, and which software not to run.

Given this starting point, it's wrongful to place restrictions on how people use or modify software; if you do, you're taking away an "essential freedom."<sup>136</sup> Such restrictions come in many forms. The most basic consists of withholding source code. You can't easily understand how a program works or modify it without the source code, and since those freedoms are essential, "accessibility of source code is a necessary condition for free software."<sup>137</sup> There's no positive obligation to give anyone else any software at all, but giving them software without the corresponding source code is disrespectful because it treats their freedoms in the software as less important than your own. Thus, source-code secret-keeping is an unethical act. Stallman refers to nondisclosure agreements as "betrayal" because they constitute "promise[s] to refuse to cooperate with just about the entire population of the planet Earth."<sup>138</sup>

This view is also evident in places like the Defective by Design anti-DRM campaign and the FSF's broadsides against "Treacherous Computing." DRM systems that answer to their creators, rather than their

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130. See Free Software Foundation, Free Software and Free Manuals, <http://www.fsf.org/licensing/essays/free-doc.html> (last visited Mar. 24, 2009).

131. See, e.g., Definition of Free Cultural Works, <http://freedomdefined.org/Definition> (last visited Mar. 24, 2009).

132. GNU Project, The Free Software Definition, <http://www.gnu.org/philosophy/free-sw.html> (last visited Mar. 24, 2009).

133. See E. Gabriella Coleman & Alex Golub, *Hacker Practice: Moral Genres and the Cultural Articulation of Liberalism*, 8 ANTHROPOLOGICAL THEORY 255 (2008).

134. See Richard Stallman, GNU Project, Why "Open Source" Misses the Point of Free Software, <http://www.gnu.org/philosophy/open-source-misses-the-point.html> (last visited Mar. 24, 2009).

135. See SAMIR CHOPRA & SCOTT D. DEXTER, *DECODING LIBERATION: THE PROMISE OF FREE AND OPEN SOURCE SOFTWARE* 40 (2007).

136. GNU Project, *supra* note 132.

137. *Id.* (stating that "access to the source code is a precondition" for two out of four essential freedoms).

138. See WILLIAMS, *supra* note 128, at 7, 21. In person, Stallman is fond of humanizing the "victims" of this betrayal by pointing at individual audience members and saying that the nondisclosing programmer betrayed "you, too." *Id.* at 21.



users, limit what users can do with their own computers.<sup>139</sup> They therefore directly prevent the exercise of essential freedoms, which makes their use unethical.<sup>140</sup> Note that this is a stronger critique than the one we saw above, which criticized only the use of DRM to exact unfair concessions from consumers. Here, by contrast, the claim is that DRM is a product with no ethical uses.

The most pointed critique is saved for legal restrictions. In Stallman's words, "When a program has an owner, the users lose freedom to control part of their own lives."<sup>141</sup> This isn't just an argument against software copyright policy; it's also an argument about how programmers ought to behave. Stallman again: "[A]n ethical software developer will reject the option" of using copyright to control software.<sup>142</sup> This ethical obligation trumps the "temptation" of "practical advantage."<sup>143</sup> Indeed, one has an ethical obligation not to assert software copyrights, even if that means one can't make a living as a programmer. Stallman is perfectly up-front in accepting that a world of free software may be a world with fewer programmers.<sup>144</sup> If you can't be an author and ethical too, it's better not to be an author at all.

Copyright law, to the extent that it gives authors the tools they need to carry out this oppression, is complicit in their unethical behavior. Since copyright inherently *is* a right to exclude—that is, a right to prevent use—it may therefore be beyond redemption. The free software critique is thus a radical one. It sees copyright law itself as an obstacle to a truly ethical system of intellectual production. Stallman has stated that "the law should conform to ethics, not the other way around."<sup>145</sup>

What's an ethical programmer to do, then? That's where free software licenses come in. An author who uses a free software license gives up the option of using copyright to prevent users from exercising their essential freedoms.<sup>146</sup> We could describe the FSF's General Public License (GPL)<sup>147</sup> and other free software licenses as a clever, necessary act of jujitsu. One needs free licenses to act ethically as an author within the broader, broadly unethical copyright system. They enable one to live

139. See, e.g., Richard Stallman, GNU Project, Can You Trust Your Computer?, <http://www.gnu.org/philosophy/can-you-trust.html> (last visited Mar. 24, 2009).

140. See Peter Brown, Defective by Design, What Is DRM? Digital Restrictions Management, [http://www.defectivebydesign.org/what\\_is\\_drm](http://www.defectivebydesign.org/what_is_drm) (last visited Mar. 24, 2009) ("Unfree software implementing DRM technology is simply a prison in which users can be put . . .").

141. Richard Stallman, GNU Project, Why Software Should Not Have Owners, <http://www.gnu.org/philosophy/why-free.html> (last visited Mar. 24, 2009).

142. See Stallman, *supra* note 129.

143. Stallman, *supra* note 134 (emphasis altered).

144. See Stallman, *supra* note 129.

145. *Id.*

146. See generally GNU Project, Various Licenses and Comments About Them, <http://www.gnu.org/philosophy/license-list.html> (last visited Mar. 24, 2009).

147. GNU Project, GNU General Public License, <http://www.gnu.org/copyleft/gpl.html> (last visited Mar. 24, 2009) [hereinafter GPL].

without doing harm to audiences, but they don't make the system itself acceptable.

E. Gabriella Coleman has documented how the Debian free software project educates its programmers to think about license choice issues in explicitly ethical terms.<sup>148</sup> One might use a maximally permissive license on the theory that it maximizes user freedom.<sup>149</sup> Or one might use a "copyleft" license like the GPL, which requires licensees who modify the program—and thereby become authors themselves—to grant the same freedoms to their own audiences.<sup>150</sup> The FSF's official position is that using a noncopyleft license is "not doing wrong," but that it's "not the best way to promote users' freedom."<sup>151</sup>

The ethical picture that emerges is deontic, relational, reciprocal, and respectful. It's okay not to program, and it's okay not to share programs at all, but once you do share, it's obligatory to share the source code as well.<sup>152</sup> That obligation is triggered the moment you enter into an author-audience relationship with someone else.<sup>153</sup> Copyleft then relates that obligation to your own receipt of software; the GPL makes you share source code because someone else shared it with you. Authors show respect by not trying to take away audiences' rights; audiences ought to show respect for authors, but oughtn't be compelled to do so. Centrally for our purposes, free software licenses in general are incompatible with the default ethical vision of commercial exchange, and copyleft licenses go further by restraining downstream authors from taking part in the commercial exchange system as well.<sup>154</sup>

One might object that there's no explicit conflict. The FSF doesn't complain about the sale of software itself, only about restrictions on post-sale use,<sup>155</sup> and the GPL allows programmers to charge for a copy of the software.<sup>156</sup> On this view, it sounds as though asking to be paid for one's work isn't ethically problematic in itself. That's true, and the distinction is significant, but still, it only goes so far. Imagine an abolitionist telling a

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148. See E. Gabriella Coleman, *Three Ethical Moments in Debian 49* (Sept. 15, 2005) (unpublished draft), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=805287](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=805287).

149. See CHOPRA & DEXTER, *supra* note 135, at 49–50.

150. *Id.*; see also GNU Project, *What Is Copyleft?*, <http://www.gnu.org/copyleft/copyleft.html> (last visited Mar. 24, 2009).

151. See GNU Project, *Why Copyleft?*, <http://www.gnu.org/philosophy/why-copyleft.html> (last visited Mar. 24, 2009).

152. This may be one situation in which "commons" rhetoric, discussed *infra* Part III.D, is actually more demanding, since it suggests that there is a positive ethical obligation to share and to contribute to humanity's common pool of knowledge.

153. See GPL, *supra* note 147.

154. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 63–67 (2007).

155. See GNU Project, *Selling Free Software*, <http://www.gnu.org/philosophy/selling.html> (last visited Mar. 24, 2009).

156. See GPL, *supra* note 147 ("You may charge any price or no price for each copy that you convey . . .").

plantation owner that there's nothing wrong with the sale of cotton for money, only with the legal system of slavery backing it up.

It's precisely the legal restrictions on post-sale use that conventional copyright theory depends on to keep the price from dropping to zero. If the threat to enforce those restrictions is unethical and therefore off the table, the default ethical vision's favorite system of exchange falls apart. Patronage, commissions, and tip jars are available models in a world without exclusive rights, but not an above-marginal-cost market for copies. The default ethical vision of copyright doesn't hold together without authors' exclusive rights in copyrighted works to mirror audiences' exclusive rights in their money.

#### D. "I Love to Share"

It's against that backdrop that we should seek to understand the sharing rhetoric of Creative Commons. Like a free software license, a Creative Commons license works within the superstructure of copyright law's system of entitlements; it takes as given the initial legal grant of rights to authors, but offers them a way to relinquish some of those rights by sharing their works freely with audiences. Other, similar rhetoric comes from Wikipedia and other Wikimedia projects—particularly the Wikimedia Commons—which try to rely on voluntary authorial contributions (among others) to build up a rich stock of material for audiences. Eric Johnson's Konomark is to the same effect: a voluntary symbol a creator can apply to a work to invite a conversation about possible free reuse.<sup>157</sup> Let's look at how they make their case.

The first word that's everywhere is "share." Creative Commons' homepage proclaims, "Share, Remix, Reuse—Legally";<sup>158</sup> it sells t-shirts with the slogan "I love to share";<sup>159</sup> its copyleft license option is named "Share Alike."<sup>160</sup> "Share" is an evocative word; it suggests the innocent generosity of children, as well as thoughtfulness about others. That's why some hackers use the phrase "share and enjoy!" when they give away software,<sup>161</sup> and why Stallman's "Free Software Song" begins, "Join us now and share the software."<sup>162</sup> It's also why Eric S. Raymond refers to these practices as a "gift culture."<sup>163</sup>

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157. See Konomark, <http://www.konomark.org/> (last visited Mar. 24, 2009).

158. Creative Commons, <http://creativecommons.org/> (last visited Feb 19, 2009).

159. Creative Commons, I Love to Share, <http://support.creativecommons.org/store/ilovetoshare> (last visited Mar. 24, 2009).

160. Creative Commons, Attribution-Share Alike 3.0 Unported, <http://creativecommons.org/licenses/by-sa/3.0/> (last visited Mar. 24, 2009).

161. The Jargon File (version 4.4.7), Share and Enjoy!, <http://www.catb.org/~esr/jargon/html/S/Share-and-enjoy-.html> (last visited Mar. 24, 2009).

162. Richard Stallman, GNU Project, The Free Software Song, <http://www.gnu.org/music/free-software-song.html> (last visited Mar. 24, 2009).

163. ERIC S. RAYMOND, *Homesteading the Noosphere*, in THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY 65, 80–82 (rev. ed. 2001).

This last formulation emphasizes the idea of sharing as altruism: a voluntary decision to do something nice for others. The Creative Commons blog archives are replete with stories of “featured commoners” who created something and then used a Creative Commons license to share it freely with audiences.<sup>164</sup> Wikipedia barnstars for valued contributors similarly recognize outstanding sharing.<sup>165</sup> The ethical view here is that authors who choose to share are treating their audience with generosity and respect, and we ought to praise them for it.

The second omnipresent word is “commons,” which summons up pictures of unenclosed fields open to all. The name “Creative Commons” appropriates this ideal of a shared, uncontrolled resource and harnesses it to a vision of thriving creativity by tapping into a thriving academic discourse about the intellectual commons: a large pool of works on which anyone is free to draw.<sup>166</sup> The idea emphasizes sequential, incremental creativity: “[T]he new always builds on the old,” as Larry Lessig puts it.<sup>167</sup> The logo of the Students for Free Culture organization uses interlocked toy bricks to emphasize this “building” idea,<sup>168</sup> a visual metaphor that Creative Commons also employs.

This way of thinking about the “commons” emphasizes the (mediated) relationship of contribution to the commons so that others can draw from it and the reciprocity of allowing others to build on your own works in turn. In so doing, it breaks down some of the division between author and audience we saw in the default vision.<sup>169</sup> Without a clear flow of money, it’s harder to type someone based on whether they pay or are paid. Instead, individuals are seen as moving back and forth; engaging with works both as appreciative audience and recasting derivative author. Wikipedia defines itself as the encyclopedia that “anyone can edit”<sup>170</sup>; that is, every reader is also a potential author. Linus’s Law, “Given enough eyeballs, all bugs are shallow,” emphasizes that every user of open source software is also a potential developer.<sup>171</sup> Fittingly, the Share Alike logo is a circular arrow; what goes around comes around.

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164. See, e.g., Creative Commons, *Featured Commoners: Severed Fifth* (Oct. 21, 2008), <http://creativecommons.org/weblog/entry/10174>.

165. See PHEOBE AYERS ET AL., *HOW WIKIPEDIA WORKS: AND HOW YOU CAN BE A PART OF IT* 333–34 (2008).

166. See, e.g., DAVID BOLLIER, *VIRAL SPIRAL: HOW THE COMMONERS BUILT A DIGITAL REPUBLIC OF THEIR OWN* (2008); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, *LAW & CONTEMP. PROBS.*, Winter/Spring 2003, at 33.

167. Lawrence Lessig, *Copyright Law and Roasted Pig*, *RED HERRING*, Oct. 21, 2002, <http://www.redherring.com/Home/10259>.

168. FreeCulture.org, <http://freeculture.org> (last visited Mar. 24, 2009).

169. See generally Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 *N.Y.U. L. REV.* 1 (2004).

170. See Wikipedia, <http://en.wikipedia.org/wiki/Wikipedia> (last visited Mar. 24, 2009).

171. Despite its name, “Linus’s Law” was coined by Eric S. Raymond. See ERIC S. RAYMOND, *The Cathedral and the Bazaar*, in *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY*, *supra* note 163, at 19, 30.

Another frequent trope is that of “community.”<sup>172</sup> There’s a reason that “community site” is a web 2.0 buzzword for anything with communicative user-generated content features: people who create and share freely with each other aren’t just taking part in arms-length transactions; they’re building social institutions.<sup>173</sup> Yochai Benkler and Helen Nissenbaum give a virtue-ethics analysis of this phenomenon. For them, deeper principles of autonomy, democracy, and mutual respect are furthered by a culture of mutual sharing—and participation in such a culture teaches individuals how to be virtuous.<sup>174</sup>

To summarize, then, “commons” and “sharing” rhetoric prizes voluntary authorial contributions to a pool on which anyone is free to draw. These tropes help tell a story about how people depend on the commons, so that placing material into the commons becomes an ethical act. It also helps create bonds of respect, honor, and enthusiasm between authors and grateful audiences—as well as fueling future repetitions of this exchange as audiences become authors themselves who, in turn, share with the commons, and so on. Like the default ethical vision, this view explains how authors and audiences can behave ethically toward each other—but it does so in a way perhaps less fraught with obligation.

#### IV. IS SHARING RADICAL?

We now have four ethical scripts on the table, four clusters of common arguments about copyright that have some interesting ethical content. Let’s see if we can situate them in relation to each other.

To recap, I’ve argued that there’s a default ethical vision in copyright law of market exchange, and that both the “respect copyrights” story and its “don’t sue your customers” counterstory subscribe to that vision in at least its basic form. The “software should be free” rhetoric of the free software movement, by comparison, claims that this vision itself is flawed. The exclusive rights that make it practically possible are so deeply wrong that the vision itself should be scrapped. This critique treats as unethical authors who sell copies of their works while retaining copyright control—the basic act that the default vision treats as the paradigm of proper behavior.

We might ask, then, where “I love to share” fits into this vision. Does it belong inside the copyright system, or outside of it? Is it compatible with commercial relationships, or opposed to them? Does it believe that authors who sell their works are behaving ethically or unethically? As we shall see, the answers to these questions are deeply ambiguous.

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172. See, e.g., LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 222–24 (2008).

173. See CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 25–54 (2008).

174. Yochai Benkler & Helen Nissenbaum, *Commons-Based Peer Production and Virtue*, 14 J. POL. PHIL. 394 (2006).

### A. *Inside or Outside?*

A Creative Commons license formally functions within the superstructure of copyright law's system of entitlements; it takes as given the initial legal grant of rights to authors, but offers them a way to relinquish some of those rights. There is therefore no structural incompatibility between sharing and copyright law; authors with copyrights can choose to share just as freely as authors without them. Indeed, one might even argue that the choice to share is more ethically meaningful when it involves a genuine relinquishment of known rights.

On the other hand, think again about the GPL jujitsu. From a free software perspective, a first-best world would have no software copyrights. In this imperfect world where software can be copyrighted, the GPL carves out, in effect, a copyright-free zone. That zone internally functions like a copyright-free world. Formal compatibility with copyright's rules doesn't tell us whether a licensing system should be read as implementing or opposing the copyright system.

### B. *Commercial or Noncommercial?*

One might argue that sharing and commerce can be friends. Larry Lessig's explanation for Creative Commons emphasizes that copyright is a one-size-fits-all system that gives the same rights to commercial and noncommercial authors.<sup>175</sup> Professionals can use their exclusive rights to form respectful relationships on the default vision; amateurs can waive those rights and form respectful relationships within a sharing model. Thus, Creative Commons enables happy, peaceful, voluntary coexistence between what Lessig calls "read-only" commercial culture and "read-write" sharing culture.<sup>176</sup>

Indeed, it's possible to go further and argue that sharing enhances commerce. Shaving companies give away the razor and sell the blades; musicians give away the single and sell the album. Chris Anderson offers a taxonomy of business models built around giving things away for free, all of which are built around some alternative stream of revenue from audiences back to authors.<sup>177</sup> This is a vision of sharing that's completely seamless with the default ethical vision; sharing and selling are complementary forms of engagement between author and audience.

Then again, there's another way to look at Eric S. Raymond's positive vision of altruistic programmer communities, the Free Culture movement's praise for self-sufficient creative communities, and Creative Commons' promotion of vibrant, growing pools of openly licensed material. They provide practical concrete models of how noncommercial creativity is sustainable, how payment is unnecessary to the ethical accumulation of

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175. See generally LESSIG, *supra* note 172, at 28–31.

176. *Id.*

177. See Anderson, *supra* note 116.

large bodies of creative works by audiences, and how the author-audience divide itself is unnecessary. All of these undermine assumptions made by the default ethical vision about how the creative process functions and, in so doing, undermine its ethical claims about how the author-audience divide must be mediated to be ethical. To the extent that sharing demonstrates an entirely nonmonetary model of intellectual and cultural production, it thereby implicitly calls into question the necessity of selling at all—and might therefore be heard to say that there’s something wrong with selling.

### C. Authorial Choice or Audience Freedom?

Niva Elkin-Koren has argued that Creative Commons’ strategic choice to depend on purely voluntary licensing leads to an “ideological fuzziness.”<sup>178</sup> Benjamin Mako Hill adds that refusing to draw a “line in the sand” of minimal audience rights means Creative Commons can’t “represent even [a] minimal attachment to any *defined* spirit of sharing.”<sup>179</sup> Commentators have questioned whether terms in the Attribution license permit authors to exercise dangerous downstream vetoes,<sup>180</sup> whether Creative Commons’ anti-DRM clauses sufficiently deal with the threat of technical lockup,<sup>181</sup> and whether its Sampling licenses restrict what should be fundamental freedoms of noncommercial sharing.<sup>182</sup> Even the Noncommercial licenses are not “free” because, in the words of the Debian Free Software Guidelines, they limit the freedom to use the work “for any purpose” and “discriminate[] against fields of endeavor.”<sup>183</sup>

On this view, Creative Commons tells authors that grasping control is as acceptable a choice (legally and ethically) as choosing to share is. By telling authors that they can choose which license to use—or choose not to use one—it merely legitimates the legal structures that give them those rights in the first place.<sup>184</sup> The complaint, in essence, is that Creative Commons reinforces the default ethical vision.

178. See Niva Elkin-Koren, *What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 377 (2005).

179. Posting of Benjamin Mako Hill to Advogato, <http://www.advogato.org/article/851.html> (July 29, 2005, 19:18 UTC).

180. See Evan Prodromou, Debian Creative Commons Workgroup Report (Aug. 10, 2006), [http://evan.prodromou.name/Debian\\_Creative\\_Commons\\_Workgroup\\_Report](http://evan.prodromou.name/Debian_Creative_Commons_Workgroup_Report).

181. See Terry Hancock, *Debian and the Creative Commons*, *FREE SOFTWARE MAGAZINE*, Oct. 18, 2006, [http://www.freesoftwaremagazine.com/columns/debian\\_and\\_the\\_creative\\_commons](http://www.freesoftwaremagazine.com/columns/debian_and_the_creative_commons).

182. See Posting of Lawrence Lessig to Creative Commons, <http://creativecommons.org/weblog/entry/7520> (June 4, 2007).

183. See Prodromou, *supra* note 180; Debian Social Contract, [http://www.debian.org/social\\_contract](http://www.debian.org/social_contract) (last visited Mar. 24, 2009).

184. See Anna Nimus, Subsol, Copyright, Copyleft and the Creative Anti-Commons, [http://subsol.c3.hu/subsol\\_2/contributors0/nimustext.html](http://subsol.c3.hu/subsol_2/contributors0/nimustext.html) (last visited Mar. 24, 2009) (“The Creative Commons mission of allowing producers the ‘freedom’ to choose the level of restrictions for publishing their work contradicts the real conditions of commons-based production.”).

On the other hand, “sharing” language has a natural affinity to stronger claims about “freedom.” At least within the free software community, visions of wide-scale collaborative sharing are not ideologically neutral. Instead, these theories are coupled with the critique of proprietary software: this is wrong, and there’s a better way. When Stallman first criticized Xerox’s refusal to share the printer code, he could draw upon his experience in the Massachusetts Institute of Technology’s Artificial Intelligence Lab, where programmers freely shared code as they hacked on systems for mutual benefit, to offer a vision of why things didn’t need to be that way.<sup>185</sup> Sharing’s ideal of healthy author-audience relations can serve as a telling contrast to the free software critique of the ethically deficient author-audience relationships inherent in proprietary software.

In much the same way, the rhetoric of “sharing” and the “commons” can function as a natural correlative to protests about overreaching uses of copyright by authors. Even if Creative Commons itself studiously avoids criticizing authors who don’t choose Creative Commons, others need not be so shy. That’s where the Definition of Free Cultural Works goes when it says that cultural works “should be free.”<sup>186</sup> Authors who put restrictions on copying or reuse are doing something wrong. Authors who share their works are doing something right. These two claims fit naturally together in critiquing the default view.

#### D. *Who’s Afraid of Creative Commons?*

The heart of the issue, then, is that we can read “sharing” either as being allied with the default ethical vision or as allied with the free-as-in-freedom critique of that vision. The default ethical vision seizes on sharing’s generosity, its praise of voluntary engagement, and its refusal to condemn. The critique, on the other hand, points to sharing’s nonmonetary nature and its implicit rebuke of nonsharers. Both readings represent plausible, consistent extensions of sharing’s logic.

This fact has important consequences. It explains some of the (otherwise surprising) unease around the Creative Commons project and why people have criticized it from both sides. We saw above how some critics believe it lacks an agenda and needs one, but there are also people who see in it a hidden agenda for abolishing copyright.<sup>187</sup> These two critiques can’t both be right. They can, however, both sound plausible—because Creative Commons’ “sharing” rhetoric is so ambiguous.

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185. See WILLIAMS, *supra* note 128, at 7–10.

186. Definition of Free Cultural Works, *supra* note 131.

187. See, e.g., Brad Holland, *The Copy Left Is Not Right*, AIGA, Feb. 8, 2005, <http://www.aiga.org/content.cfm/the-copy-left-is-not-right>; Illustrators’ Partnership, *Alternative Copyright Gains Ground in Europe*, ILLUSTRATORSPARTNERSHIP.ORG, Feb. 9, 2005, [http://www.illustratorspartnership.org/01\\_topics/article.php?searchterm=00189](http://www.illustratorspartnership.org/01_topics/article.php?searchterm=00189) (“[Creative Commons] is intended to act as a copyright ‘virus,’ infecting traditional copyright protections throughout society.”).



This ambiguity also provides an explanation for some (otherwise puzzling) critiques of Creative Commons that seem to veer over the line into saying that authors who use Creative Commons licenses are doing something wrong. A *Billboard* article from 2005 quotes an AIDS-stricken musician as saying he wouldn't have been able to afford his medication if he had used a Creative Commons license: "No one should let artists give up their rights."<sup>188</sup> This particular critique was factually misinformed,<sup>189</sup> but there is an important intuition underlying it.

If Creative Commons is part of a broader critique of the default ethical vision, then it makes a set of ethical claims that authors who write for money and sell their works are behaving unethically. For people who are part of that system—who see themselves as acting ethically when they sell their works—this critique is either incomprehensible, crazy, or profoundly dangerous. Just as the RIAA warns kids that "free" music must be illegal and unethical, there's a hint of an idea here that authors who choose Creative Commons are betraying other authors and their audiences—they aren't showing the audience enough respect to give them something worth paying for.<sup>190</sup>

To summarize, there's a significant ambiguity in Creative Commons' response to the copyright system. It could be saying (or could be seen to say) that the system is out of balance because authors have exclusive rights they don't need and don't want to use. It could also be saying (or could be seen to say) that the system is out of balance because authors have exclusive rights they shouldn't have and shouldn't be allowed to use. In either frame, its licensing strategy is a natural response designed to encourage a healthier balance. But the latter frame, let us be clear, is a challenge to the default ethical vision of copyright itself, not merely a critique of authorial behavior made from within that vision.

## CONCLUSION

Here's a word this essay hasn't used until now: *incentives*. Here's another: *justice*. And another: *norms*. And yet another: *authorship*. Each summons up a richly developed body of intellectual property theory. An ethical vision of copyright can't be reduced to any of these other, more familiar scholarly approaches. Its arguments are not merely defective, mangled versions of the conventional moves in copyright scholarship. It's a theory of intellectual property in its own right. It tells people what they

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188. Susan Butler, *One Artist's Cautionary Tale*, BILLBOARD, May 28, 2005, at 25 (quoting Andy Fraser) (internal quotation marks omitted); see also Susan Butler, *For the Common Good?*, BILLBOARD, May 28, 2005, at 21.

189. See Lessig 2.0, [http://lessig.org/blog/2005/05/first\\_were\\_a\\_virus\\_now\\_we\\_kill.html](http://lessig.org/blog/2005/05/first_were_a_virus_now_we_kill.html) (May 22, 2005, 02:52 AM).

190. See, e.g., Emma Pike, *Let's Be Clear About Creative Commons*, UK MUSIC, May 2005, <http://www.ukmusic.org/page/article-5> ("For the huge tranche of writers falling between the extremes of hobbyist versus big time, Creative Commons fails to deliver any real benefits, yet some may be lured into it by its often seductive rhetoric.")

should and shouldn't do with information goods; it tells lawmakers what they should and shouldn't allow. That alone makes it interesting and worthy of study.

None of this, however, is meant to disparage these other approaches, all of which remain interesting and useful. Instead, the most interesting thing about an ethical vision of copyright may be the fresh perspective it gives us on well-worn arguments. We can enrich our understanding of copyright law by asking how it mediates among the conflicting claims of utilitarian economics, distributive justice, natural rights—and relational ethics.<sup>191</sup> We can complicate our conversations about copynorms by studying how ethical rhetoric is used to build up norms and to tear them down.<sup>192</sup> We can craft more compelling copyright reforms by framing them in ethically appealing ways. Here are a few particularly intriguing questions we might ask:

- What is the connection between the nature of authorship and the ethics of the author-audience relationship? This essay has focused on ethical issues raised by the enforcement side of copyright; we might do the same on the source-of-rights side.
- How stable are hybrids between commercial and amateur culture, not just economically but ethically? If you and I see each others' choices as merely inefficient, we can probably live and let live. But if we see each others' choices as unethical, peaceful coexistence seems less likely.
- How do people connect their immediate ethical claims about actions that are right or wrong in themselves with longer-term stories about outcomes, incentive structures, a good and just society, and so on? Almost everyone slips back and forth between these ways of talking. Their rhetorical moves might be interesting.
- What would a truly ethical system of copyright law look like? This essay has focused on the rhetoric of competing ethical claims about copyright, rather than on the merits of those claims. Perhaps philosophers might try to give one of those claims a firm grounding—or to prove that no such grounding is possible.

One author has already asked these questions. No one has done more to integrate ethical perspectives with other ways of talking about copyright than Larry Lessig. His two books of activism—*Free Culture* and *Remix*—

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191. Compare, for example, the arguments discussed in this essay with the theories laid out in Fisher, *supra* note 25.

192. See, e.g., Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 675–91, 710–18 (2006) (describing central role of reciprocity among musicians and fans in sustaining a mixed system of commerce and sharing).

move freely among these different ways of talking about copyright. Lessig doesn't theorize the approach closely; his books are works of activism, after all. But there's something to it, something worth dwelling on. He links economic arguments about innovation and artistic productivity to moral ones about the value of personal creativity and social engagement. Part of his books' extraordinary persuasive power comes from the ethical clarity they bring to copyright policy.

*Free Culture* was inspired by Richard Stallman.<sup>193</sup> *Remix* is dedicated to Jack Valenti.<sup>194</sup> Their author sits on the boards of the Electronic Frontier Foundation<sup>195</sup> and Creative Commons.<sup>196</sup> Larry Lessig, just by himself, is a plausible representative of all four ethical visions of copyright discussed in this essay. They may differ in the details, but they're united by a common concern for a society in which people are creative and treat each other well. Lessig shares that concern, and so should we.

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193. LAWRENCE LESSIG, *FREE CULTURE*, at xv (2004).

194. LESSIG, *supra* note 172, at vii.

195. Electronic Frontier Foundation, Board of Directors, <http://w2.eff.org/about/board/> (last visited Mar. 24, 2009).

196. Creative Commons, People, <http://creativecommons.org/about/people> (last visited Mar. 24, 2009).

## *Notes & Observations*