
RETHINKING COPYRIGHT AND PERSONHOOD

Christopher S. Yoo*

One of the primary theoretical justifications for copyright is the role that creative works play in helping develop an individual's sense of personhood and self-actualization. Typically ascribed to the writings of Immanuel Kant and Georg Wilhelm Friedrich Hegel, personhood-based theories of copyright serve as the foundation for the moral rights prominent in European copyright law and mandated by the leading intellectual property treaty, which give authors inalienable control over aspects of their works after they have been created. The conventional wisdom about the relationship between personhood and copyright suffers from two fatal flaws that have gone largely unappreciated. First, in terms of intellectual provenance, it is inconsistent with both the philosophical spirit of Kant and Hegel as well as their specific writings about the protection of creative works. Second, focusing exclusively on the treatment of works after they have been created adopts too narrow a vision of how creativity develops personality by ignoring the self-actualizing benefits of the creative process itself. This Article seeks to address both deficiencies in the traditional approach to copyright and personhood theory. It begins by examining Kant's and Hegel's general philosophical approaches and their specific writings about copying to show that neither provides a strong foundation for a robust account of copyright based on self-actualization. It then reconceives the relationship between copyright and personhood based on a more expansive vision that does not simply regard creative works as artifacts but rather as sources of engagement that can develop personality and personhood based on aesthetics, psychology, and literary theory. It then explores the implications of a theory that values the creative process for the process itself and not just for the artifacts it creates; specifically, how it takes the interests of follow-on authors into account, emphasizes educational uses, and provides an affirmative theory of the public domain. At the same time, the internal

* John H. Chestnut Professor of Law, Communication, and Computer & Information Science and Founding Director of the Center for Technology, Innovation and Competition, University of Pennsylvania. The author thanks participants at the Intellectual Property Scholars Conference, the Conference on "Value Pluralism and Intellectual Property Law" at the University of Hong Kong, and workshops at Wake Forest University, Temple University, Benjamin N. Cardozo School of Law, Drexel University, and Boston University for comments on earlier drafts.

logic of this approach carries with it several limitations regarding commercialization and dissemination.

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I. INTRODUCTION

Personhood theory figures prominently in virtually every list of theoretical justifications for intellectual property in general¹ and copyright in particular.² Typically ascribed to the philosophical ideas of Georg William Friedrich Hegel and Immanuel Kant, this theory posits that authors have such deep connections with their creations that respect for their sense of self requires giving them a degree of ongoing control over those works.³ In essence, authors treat their works as extensions of their person.⁴ As such, certain types of interference with those works would be tantamount to intruding on a part of the author's body.

The most common legal embodiment of personhood theory in copyright law is so-called moral rights, widely recognized in continental Europe and incorporated into the 1928 revision to the Berne Convention for the Protection of Literary and Artistic Works.⁵ Although the details vary from jurisdiction to jurisdiction, in general, moral rights give authors control over "whether, when, by whom, and in what manner her work is presented to the public."⁶

The predominant approach to personality theory is typically construed as leading to a strong vision of copyright that gives initial authors near absolute control over many aspects of copyright protection to the exclusion of audiences and follow-on authors.⁷ In many cases, personhood interests are so strong as to

1. See, e.g., William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 171–72, 189–92 (Stephen R. Munzer ed., 2001); ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 6–10 (5th ed. 2010); Seana Valentine Shiffrin, *Intellectual Property*, in *2 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 653, 660 (Robert E. Goodin et al. eds., 2d ed. 2007).

2. See, e.g., ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 25 (2010); Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 82 (1998). See generally Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 *MICH. L. REV.* 1197, 1239–44 (1996).

3. See, e.g., 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 145 (2d ed. 1987); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 *GA. L. REV.* 1, 26–27 (1988); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 *RUTGERS L.J.* 347, 359 (1993).

4. For an early statement, see Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 *HARV. L. REV.* 554, 557 (1940) ("When an artist creates, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use.").

5. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, 828 U.N.T.S. 221.

6. Netanel, *supra* note 3, at 350. Although the term "moral rights" follows the French term *droit moral*, the concept is more accurately captured by the German term *Urheberpersönlichkeitsrecht*, which means author's rights of personality. *Id.* at 383 n.162; accord Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 *AM. J. COMPARATIVE L.* 67, 92 (2007) (using the shorter form, *Persönlichkeitsrecht*).

7. See, e.g., Barbara Friedman, Note, *From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 *CARDOZO ARTS & ENT. L.J.* 157, 169 (1994) ("[M]odern commentators have for the most part used Hegel to defend near-absolute copyright protections, including derivative rights.").

render moral rights inalienable.⁸ In addition, the traditional approach to personhood theory values creative works only as static artifacts. The role of creativity in developing personality is limited to how the works are treated after they have been created, and it accords no role to the process of how works are created that can foster personality.

I believe that the conventional wisdom about the relationship between personhood and copyright suffers from some fundamental flaws. In terms of its supposed philosophical foundations in Hegel and Kant, the conventional wisdom is quite at odds with a close reading of Hegel's and Kant's analyses of the relationship between property and personality in general and their oft-overlooked writings specifically addressing the unauthorized publication of books.⁹ Of particular note is the limited protection that both Kant and Hegel would accord to nonliterary and derivative works.¹⁰ In so doing, the work of Hegel and Kant support a vision of copyright that is far less monolithic and uncompromising than the one associated with the traditional approach.¹¹

Furthermore, by focusing exclusively on how creative works are treated after they have been created, the conventional wisdom ignores a broader range of ways that creativity can develop personality.¹² Since then, a vibrant literature in aesthetics, psychology, and philosophy has arisen that explores how the heuristic process of creating works can play a key role in self-actualization.¹³ A more encompassing conception of the relationship between personhood and creativity would regard creative works as more than mere repositories of personality and would examine how the process of creation itself can promote self-actualization.

Reconceptualizing personhood-based theories of copyright in this manner provides a number of important insights. As an initial matter, the broader approach provides a personality-based justification for considering the interests of follow-on authors in using the creative process to develop their own personalities.¹⁴ To the extent that creativity necessarily builds on and extends the preexisting corpus of creative works, such a theory would provide an affirmative basis for providing follow-on authors with sufficient access to the existing corpus of prior works to support their personal self-development.

8. See Rigamonti, *supra* note 6, at 97–98 (tracing inalienability to the influence of OTTO VON GIERKE, *DEUTSCHES PRIVATRECHT* 756 (1895)). For a review of the inalienability of moral rights, see Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 *CARDOZO ARTS & ENT. L.J.* 1, 48–77 (1994).

9. For Hegel's views, see GEORG FRIEDRICH VON HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* ¶¶ 4–69 (T.M. Knox trans., Oxford 1952) (1821). For Kant's views, see Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books*, in *PRACTICAL PHILOSOPHY* 23, 31–35 (Mary J. Gregor trans. & ed., 1996) (1785). See also IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 106–07 (Mary Gregor trans., 1991) (1797) (discussing “What is a book?”).

10. See *infra* Subsections II.A.2 and II.B.2.

11. See generally Netanel, *supra* note 3, at 374–378; *cf. id.* at 363 (“United States copyright doctrine has traditionally conceived of works of authorship as external to the self—as not only separable, but separate, from the author.”).

12. Hughes, *supra* note 2, at 83.

13. See *infra* note 20 and accompanying text.

14. Friedman, *supra* note 7, at 176–84.

If this were all that were necessary, personhood theory would yield only a right of access for personal uses that omitted any right to share any derivative works created in this manner with anyone else. To the extent, however, that creativity must have an audience in order to be truly self-actualizing, this new approach would provide a basis for a right to disseminate works created in this manner notwithstanding the fact that they borrow from prior works.

The broader approach to personality also offers a possible response to one of the criticisms of existing copyright scholarship, which is the failure to provide a clear, affirmative theory of the public domain.¹⁵ Indeed, even public domain advocates concede that the public domain remains defined largely in negative terms¹⁶ and recognize the need for better articulation of affirmative theories of the public domain.¹⁷ The revised personhood-based justification for copyright offers a basis for identifying a core of creative material that must remain in the public domain if individuals are to develop their sense of self.

At the same time, any theory providing an affirmative justification for copyright necessarily carries with it implicit limits. The reconceptualized personhood-based theory of copyright is no exception. As an initial matter, the scholarship on which it is based strongly contends that in order to be self-actualizing, creativity must exist as an end unto itself and not be instrumentally motivated to realize other objectives.¹⁸ This commitment strongly militates against extending the right of access and dissemination to works that are commercial in nature. It supports broader rights of access for educational purposes and more limited rights for nonchildren.

15. Most trenchantly, Edward Samuels asks whether “the public domain [is] simply whatever is left over the after various tests of legal protection have been applied[]” or whether the public domain is animated by “some compelling public policy or legal principle, that gives it a life of its own, that would tend to attribute positive aspects to it,” only to conclude “that there is no such animal: the public domain is simply whatever remains after all methods of protection are taken into account.” Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC’Y U.S.A. 137, 137–38 (1993); *accord id.* at 149 (concluding, after reviewing the proffered affirmative justifications for the public domain, that “it would appear that there simply is no such general theory”); *see also* Edward Samuels, *The Public Domain Revisited*, 36 LOY. L.A. L. REV. 389, 391 (2002) (reaffirming Samuels’s belief that “what I said in 1993 is essentially still correct”); Vincenzo Vinciguerra, *Contributing to the Understanding of the Public Domain*, 24 J. MARSHALL J. COMPUTER & INFO. L. 411, 453 (2006) (noting that “the sum of the very different approaches and theories contribute to an image of the public domain as an ‘empty box,’ capable of every form and meaning, and thus, with no defined form altogether”).

16. *See* James Boyle, *Foreword: The Opposite of Property*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 1, 30 (“The term ‘public domain’ is generally used to refer to material that is unprotected by intellectual property rights”); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968, 976 (1990) (describing the public domain as “a commons that includes those aspects of copyrighted works which copyright does not protect” and “the realm comprising aspects of copyrighted works that copyright does not protect”); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 217 (2002) (“Often the public domain is defined in terms of what it is not.”).

17. *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 361 (1999) (“The particular weakness of the traditional definition of the public domain is that it evokes an intuition about the baseline, while not in fact completely describing it.”); James Boyle, *Cultural Environmentalism and Beyond*, LAW & CONTEMP. PROBS., Spring 2007, at 5, 8 n.11 (recognizing that “we do need a better theory of the public domain,” while acknowledging that the result may be multiple, overlapping theories).

18. Carl R. Rogers, *Toward a Theory of Creativity*, 11 ETC.: REV. GEN. SEMANTICS 249, 252 (1954).

Moreover, the fact that the interests of follow-on authors must be balanced against the interests of initial authors dictates that any right of dissemination must be restricted only to the amount necessary for authors to develop their personalities. To conclude otherwise would avoid the problem of privileging the interests of initial authors over all others only to fall into the opposite trap of focusing exclusive attention on the interests of follow-on authors.

The result is a reconceptualization of personhood theory of copyright that is more consistent with the philosophical foundations on which personhood theory is traditionally based and that takes into account a broader range of mechanisms through which creative works can promote self-actualization. It supports an affirmative basis for recognizing a right of access (and perhaps dissemination) by follow-on authors while simultaneously balancing them against the interests of initial authors.

The Article is organized as follows: Part II revisits the manner in which the conventional wisdom invokes Hegel and Kant by taking a close examination of their theories of property in general and their analyses of unauthorized copying of books in particular. It points out that the narrow focus on the disposition of the creative work reflects a fundamental misunderstanding of these thinkers' vision of the role that property plays in defining personhood. A detailed reading of their copyright-related works also yields a vision of copyright that is far less protective of the rights of initial authors than is generally understood.

Part III examines the aesthetic tradition exploring the role that creativity serves in developing a person's faculties and personality, taking as its starting point the seminal work of Immanuel Kant and Friedrich Schiller. Although Kant and Schiller offered a passive vision of play in which audiences simply contemplate great works of art, later psychologists, aestheticians, and philosophers articulated a more active vision in which individuals actively engage in the creative process.¹⁹ It culminates in a theory that recognizes that individual self-actualization may depend on people becoming authors themselves.²⁰ Drawing on the work recognizing that creativity often builds on prior works, this theory suggests that individual self-development may require a degree of access to the preexisting corpus of creative works.²¹ It then explores whether, in addition to being created, creative works must be read or shared with a community in order to play a role in developing one's sense of personality, which would in turn support a right of dissemination.

19. See *infra* note 20 and accompanying text.

20. Other scholars have explored how play can shape personality. See, e.g., JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 53–54 (2012). Cohen's views play in the context of what she calls the *situated self*, examining how the individual both shapes and is shaped by the information environment. *Id.* at 50. She views play as an intrinsic motivation that emanates entirely from the individual and is not shaped by extrinsic considerations. Examining play through the lens of the philosophy, psychology, and aesthetics also provides normative content to the concept of play, which addresses one of the central limitations of Cohen's work. See Niva Elkin-Koren, *Affordances of Freedom: Theorizing the Rights of Users in the Digital Era*, 6 JERUSALEM REV. LEGAL STUD. 96, 103 (2012).

21. COHEN, *supra* note 20, at 223–26.

Part IV explores the insights this reconceptualization yields for a personhood-based theory of copyright (discussing how it recognizes a broader range of ways that creativity develops personality), takes into account the interests of follow-on authors, and provides an affirmative theory of the public domain. It also examines the limitations implicit in the theory, discussing its emphasis on non-commercial and educational activity and providing for limits to any associated rights of dissemination.

II. HEGEL AND KANT ON PERSONHOOD AND COPYRIGHT

According to the conventional wisdom, personhood-based theories of copyright are founded on the philosophical writings of Kant and Hegel.²² Indeed, much of the academic commentary invokes both scholars' work in parallel without differentiating between them.²³ The decision to lump these thinkers together is somewhat curious in that Kant and Hegel are thought to embody distinct intellectual traditions. Kant is regarded as epitomizing the *monist* perspective that dominates German law, in which all authorial interests are vested in a single right.²⁴ Hegel is regarded as the font of the *dualist* perspective followed in France, which creates two distinct rights so that authors' economic and personal interests can receive separate protection.²⁵

Even more problematic are the differences that property plays in terms of developing individuals' senses of self. Hegel regarded property as an essential attribute of personality,²⁶ whereas property did not play so nearly as central a role for Kant.²⁷ Importantly, however, Hegelian theory does not value property because it reflects the imprint of the personality of the owner but rather because

22. For the seminal statement basing personhood theory in Kant and Hegel, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959, 962, 967, 973–78 (1982). Although Radin omitted intellectual property from her survey of how personhood theory would manifest itself in property law, she included intellectual property in a laundry list of other areas in which personhood theory seemed relevant. *Id.* at 1013 n.202. For leading examples of scholars ascribing the personhood theory of copyright in Kant, see, e.g., ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 68–101 (2011); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 289–91 (1970); Damich, *supra* note 3, at 26–27. For leading examples of scholars basing the personhood theory of copyright in Hegel, see, e.g., STEPHEN R. MUNZER, A THEORY OF PROPERTY 67–70 (Jules Coleman ed., 1990); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330–54 (1988); Sterk, *supra* note 2, at 1239–44, 1240 n.192 (noting also that the personhood theory is also sometimes attributed to Kant). For leading examples of scholars basing the personhood theory of copyright in both, see, e.g., PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 73–91 (1996); Netanel, *supra* note 3, at 359–61; Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 819–20, 837–42, 853, 862 (1990).

23. See, e.g., Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 7–10 (1997); Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 59 n.57 (1995); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1541–42 (1989); Rigamonti, *supra* note 6, at 68; Molly Van Houweling, *Authors Versus Owners*, 54 HOUS. L. REV. 371, 380 (2016).

24. Netanel, *supra* note 3, at 378–79.

25. See, e.g., Damich, *supra* note 3, at 30; Netanel, *supra* note 3, at 378–81.

26. Radin, *supra* note 22, at 971–78.

27. *Id.* at 965–68.

it reflects the recognition by others of something that distinctively belongs to the owner.²⁸ In other words, Hegel favors recognizing property rights not because the owner enjoys any special relationship with the thing owned but rather because property defines relationships between people in ways that permit the self to reify itself.²⁹

Equally curious is the fact that the conventional wisdom largely overlooks the fact that both Kant and Hegel specifically laid out their views, about the unauthorized copying of books, in works that have received relatively little attention.³⁰ A close reading of these writings reveals a much more limited vision of copyright that accords a lesser degree of protection to nonliterary and derivative works, conclusions that cannot be squared with the author-centered vision of personhood theory that gives authors a wide degree of control over their works.

This Part will explore each of these themes in turn, considering Kant's and Hegel's general theories of property and their specific writings about copyright. The analysis shows that neither thinker can properly be regarded as providing support for the conventional wisdom about personhood theories of copyright or the type of protection traditionally associated with the European tradition of moral rights.

A. Kant

Kant plays a pivotal role in personhood theory by offering the seminal conception of rights built around a strong, essential conception of a person.³¹ In addition, Kant offered views related to copying in his essay, *On the Wrongfulness of Unauthorized Publication of Books*,³² and his brief, two-page discussion of "What Is a Book?" in *The Metaphysics of Morals*.³³ These works receive relatively little attention, with the former subsisting in "relative obscurity"³⁴ and the latter being omitted from many editions of the book.³⁵ As a result, Kant is often cited as having implications for copyright, but the connection has not until recently been analyzed in depth.³⁶ The paucity of close attention has permitted misperceptions to persist about the extent to which Kant's work supports the conventional wisdom.

28. See *id.* at 971–77.

29. See *id.*

30. See HEGEL, *supra* note 9, ¶¶ 4–69; KANT, *THE METAPHYSICS OF MORALS*, *supra* note 9, at 106–07; Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *supra* note 9, at 31–35.

31. See Netanel, *supra* note 8, at 17.

32. Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *supra* note 9, at 31–35.

33. KANT, *THE METAPHYSICS OF MORALS*, *supra* note 9, at 106–07.

34. Anne Barron, *Kant, Copyright and Communicative Freedom*, 31 L. & PHIL. 1, 9 (2012).

35. David Saunders, *Approaches to the Historical Relations of the Legal and the Aesthetic*, 23 NEW LITERARY HIST. 505, 520 n.4 (1992).

36. Kant's implications have drawn greater scholarly attention in recent years. See Barron, *supra* note 34, at 8–10; Saunders, *supra* note 35, at 506–08; Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1060–64 (2008).

1. The Relationship Between Creative Works and Personhood

Although Kant builds his philosophy on a strong conception of personhood, an analysis of the details of his theory reveals it to be an unlikely foundation for protecting creative works because of their strong connections to their authors. The central tenet of Kant's work is that all individuals be treated as ends unto themselves, rather than as instrumental means toward realizing some other goal.³⁷ As expressed by Kant: "A person is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a *dignity* by which he exacts respect for himself from all other rational beings in the world."³⁸

Consistent with this view, Kant distinguished between subjects/people on the one hand and objects/things on the other. The defining characteristic of persons is that they are capable of exercising free will and having actions imputed to them morally.³⁹ Things, in contrast, are inherently "void of freedom" and are instead the "object[s] of the free activity of the Will."⁴⁰ Only aspects that fall on the object side of the dichotomy can properly be regarded as property because treating any aspect that falls on the subject side of the divide as property would violate the principle that every person be treated as an end and not a means.⁴¹

As an initial matter, Kant conceives of the person as an abstract holder of rights, devoid of individual preferences, abilities, and history.⁴² As a general matter, it is unclear how such an abstract and universal conception of personhood can serve as a repository for the individual differences that are generally thought to constitute personality. As Radin notes, "If persons are bare abstract rational agents, there is no necessary connection between persons and property. Therefore Kantian rationality cannot yield an object theory of personal property. . . . [O]bject relationships are . . . not a necessary corollary to the concept of personhood in this view."⁴³ Kant does recognize that individuals can hold legal ownership interests in external things.⁴⁴ But the reason is not because those things are embodiments of individual personality. Instead, Kant argues that failing to permit property interests would violate his "Principle of Right" by denying a person the use of a thing even when such use would not abrogate the freedom of others.⁴⁵

37. Radin, *supra* note 22, at 962.

38. KANT, THE METAPHYSICS OF MORALS, *supra* note 9, at 230.

39. IMMANUEL KANT, THE PHILOSOPHY OF LAW 31–32 (W. Hastie trans., T. & T. Clark 1887) (1796).

40. *Id.* at 32.

41. Kant writes elsewhere:

Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.

IMMANUEL KANT, LECTURES ON ETHICS 165 (Louis Infield trans., 1930).

42. Radin, *supra* note 22, at 962.

43. *Id.* at 967.

44. KANT, *supra* note 39, at 61–62.

45. *Id.* at 62–63. For Kant's definition of his Principle of Right, see *id.* at 46.

In other words, Kant respects property because of the coherentist, rationalist vision implicit in his famous categorical imperative rather than its role in constituting personality.⁴⁶ On the contrary, anything that embodies a person's will falls on the subject side of the subject-object dichotomy and cannot be treated as property. If taken to an extreme, Kant's theories would seem to contradict the conventional wisdom about personhood theory because any aspects that reflect personhood cannot be treated as property.⁴⁷

Such a simplistic view would prove too much as it would bar any publication of creative works. A closer reading of Kant reveals a relationship that is more complex. Although authors' right to control the expression of their ideas to the public is inalienable, they can contract with publishers to have them speak to the public for them.⁴⁸ In so doing, publishers serve simply as "the mute instrument for delivering the author's speech to the public" and lack any authority to hold back or modify the author's speech, even if the author dies before the work is published.⁴⁹

From this perspective, authors' rights are personality rights rather than property rights. A literary work was not property but rather speech addressed to the public and delegated to another person to speak for the author through a specific means. In this sense, the publisher is a mere agent acting on behalf of the author. Because the interests in the work remain in the author, they are inalienable. The harm of copying lay not in the breach of a property interest but rather in the infringement of authors' freedom of speech by speaking for them without their permission. An agreement to publish a work thus represents a tripartite operation in which the author conceives of the speech, the publisher disseminates it, and the public receives it. Kant also uses it to make clear that those who copy books without authorization infringe upon the rights of publishers to speak on behalf of authors and not the rights of authors themselves, who always retained their rights.⁵⁰ Because the rights at issue rest with publishers, enforcement of those rights cannot be construed as protecting the interests of authors.⁵¹

46. Radin, *supra* note 22, at 967.

47. See Treiger-Bar-Am, *supra* note 36, at 1072–75.

48. In so doing, Kant distinguished between the speech directed to the public (called the *opera*), which remained in the control of the author, and the physical embodiment of the work (called the *opus*), which was subject to the control of the publisher. KANT, *supra* note 9, at 106; Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *supra* note 9, at 30, 32, 34.

49. Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *supra* note 9, at 30, 33–34 (emphasis omitted).

50. KANT, *supra* note 9, at 107; Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *supra* note 9, at 31. For a related argument, see ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING 112–13 (2015).

51. See Saunders, *supra* note 35, at 507.

2. *The Lack of Protection for Nonliterary and Derivative Works*

Other aspects of Kant's writings on copying raise further doubts as to whether his work can serve as the foundation for protecting works because of their strong connections with the personalities of their creators typically associated with moral rights. For example, Kant concludes that owners of nonliterary works are free to make copies of them and sell them in their own name, presumably because nonliterary works lack the separation between the physical embodiment of the work and the ideas contained within it.⁵² Absent some claim that sculptures and paintings contain less of their creators' personalities than do literary works, it becomes impossible to reconcile Kant's rationale for opposing unauthorized copying with the traditional vision of personhood-based justifications for copyright.⁵³

Equally telling, Kant refused to include derivative works within his justification for prohibiting unauthorized copying.⁵⁴ Kant concludes:

[I]f someone so alters another's book (abridges it, adds to it, or revises it) that it would even be a wrong to pass it off any longer in the name of the author of the original, then the revision in the editor's own name is not unauthorized publication and therefore not impermissible.⁵⁵

When that occurs, the work is sufficiently changed so that the follow-on author does not interfere with the initial author's speech to the public, and the publisher does not hold itself out as speaking for the initial author.⁵⁶ Similarly, Kant concluded that "translation into a foreign language cannot be taken as unauthorized publication; for it is not the same speech of the author, even though the thoughts might be precisely the same."⁵⁷

The manner in which Kant perceived the relationship between creative expression and personality make it hard for his work to serve as the foundation of the conventional understanding of personhood-based theories of copyright that would protect creative works because they embody the personality of their creator. Moreover, even though Kant is often cited as the intellectual foundation for moral rights, such reliance is undercut by his willingness to place nonliterary and derivative works outside the scope of copyright protection.

52. Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *supra* note 9, at 34. In other words, for works of art, the *opera* cannot exist independently of the *opus* in which it is embodied. *Id.*

53. As such, Kant's position represents the precise opposite of U.S. law, which accords a degree of moral rights protection to sculpture and paintings under the Visual Artists Rights Act without extending any personality-based protection to literary works.

54. Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *supra* note 9, at 35.

55. *Id.*

56. *Id.* For a similar observation, see Treiger-Bar-Am, *supra* note 36, at 1080–82.

57. Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *supra* note 9, at 35.

B. *Hegel*

The other philosopher typically cited as providing a foundation for the conventional wisdom about personality theory is Hegel.⁵⁸ Unlike Kant, Hegel did regard property as playing a central role in defining a person's distinct personality.⁵⁹ But as we shall see, Hegel valued property not because of the connection between the property and the owner, but rather because of how it defines and organizes relationships between the owner and other people.⁶⁰ Like Kant, moreover, Hegel recognized only limited copyright protection over nonliterary and derivative works.

1. *The Relationship Between Creative Works and Personhood*

The fact that Hegel regarded property as playing an essential function in defining a person's personality⁶¹ offers considerable promise as a basis for a personhood-based theory of copyright. Unfortunately, any such argument would be based on a fundamental misunderstanding of Hegel's view of the relationship between property and personality. Property is important to Hegel not because of the relationship between the property and the individual but rather because of how the institution of property defines each individual's relationship with other individuals.⁶²

Like Kant, the starting point for Hegel's analysis is human will, which he regarded as the core of human existence and as essentially free and unconstrained.⁶³ In short, it is "the unrestricted infinity of absolute abstraction or universality, the pure thought of oneself."⁶⁴ The problem is that while the will is universal and self-conscious, it otherwise lacks content.⁶⁵ For the ego to develop, it must "transition from undifferentiated indeterminacy to the differentiation, determination, and positing of a determinacy as a content and object."⁶⁶ It is "[t]hrough this positing of itself as something determinate" that "the ego steps in principle into determinate existence."⁶⁷

The first step in this process manifests itself as *personality*, in which the will recognizes that it is bounded by the person's own preferences and external

58. Scholars have recently focused greater attention on Hegel's implications for copyright. See Wenwei Guan, *The Poverty of Intellectual Property Philosophy*, 38 H.K. L.J. 359, 361 (2008); Karla M. O'Regan, *Downloading Personhood: A Hegelian Theory of Copyright Law*, 7 CANADIAN J.L. & TECH. 1, 5 (2009); Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453, 453 (2006).

59. HEGEL, *supra* note 9, ¶ 51.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* ¶¶ 4–5 (arguing that free will contains "the element of pure indeterminacy or that pure reflection of the ego into itself which involves the dissipation of every restriction . . . either immediately presented by nature, by needs, desires, and impulses, or given and determined by any means whatever").

64. *Id.* ¶ 5.

65. *Id.* ¶ 35.

66. *Id.* ¶ 6.

67. *Id.*

limitations.⁶⁸ But at the same time, personality remains a “wholly abstract determination of the absolute and infinite will.”⁶⁹ Personality remains aware that the will is essentially self-relational and retains a “consciousness of [it]self as a completely abstract ego.”⁷⁰ The presence of external constraints thus does not prevent persons from “know[ing] [them]sel[ves] as something infinite, universal, and free.”⁷¹

It is by “claim[ing] that external world as its own” that the personality rises above being only subjective and abstract and becomes reified.⁷² Indeed, it is the presence of a “sphere distinct from the person” that is “different and separable” from the purely subjective consciousness of personality that allows the person to become something immediate.⁷³ Thus, in order to become determinate instead of merely abstract, “[a] person must translate his freedom into an external sphere in order to exist as [an] Idea.”⁷⁴ The way that recognizing these limits allows individuals to rise above them is epitomized by Hegel’s statement, “[I]n chains I can still be free.”⁷⁵

The primary way that a person embodies himself in the external world is by “putting his will into any and every thing and thereby making it his.”⁷⁶ Hegel called this “the absolute right of appropriation which man has over all ‘things.’”⁷⁷ Because exerting dominion over things is the essential way that the will manifests itself in the external world, Hegel called property “the *embodiment* of personality.”⁷⁸ More specifically, these objects “constitute my own private personality and the universal essence of my self-consciousness” and “are my personality as such, my universal freedom of will, my ethical life, my religion.”⁷⁹

Under the Hegelian view of personality, property thus plays a central role in defining a person as a person. Only by establishing a property interest in external objects can the will achieve a concrete existence. Hegel clearly envisioned this as encompassing not just chattels but also “[m]ental aptitudes, erudition, artistic skill, even things ecclesiastical . . . , inventions, and so forth.”⁸⁰ He recognized that “[i]t may be asked whether the artist, scholar, &c., is from the legal point of view in possession of his art, erudition, ability to preach a sermon, sing a mass, &c., that is, whether such attainments are ‘things,’” because “while possession of these may be the subject of business dealings and contracts, as if they were things, there is also something inward and mental about it.”⁸¹

68. *Id.* ¶ 41.

69. *Id.*

70. *Id.* ¶ 35.

71. *Id.*

72. *Id.* ¶ 39.

73. *Id.* ¶ 41.

74. *Id.*

75. *Id.* ¶ 48.

76. *Id.* ¶ 44.

77. *Id.*

78. *Id.* ¶ 51.

79. *Id.* ¶ 66.

80. *Id.* ¶ 43.

81. *Id.*

Like Kant, Hegel resolves this conundrum by distinguishing between the ideas contained in the work and the physical work itself. On the one hand, “[a]ttainments, erudition, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it.”⁸² At the same time, “by expressing them it may embody them in something external and alienate them.”⁸³

Copyright is “concerned with mental aptitudes, erudition, &c., only in so far as they are possessions in a legal sense.”⁸⁴ “[I]t is not until we come to deal with alienation that we need begin to speak of the *transition* of such mental property into the external world where it falls under the category of property in the legal sense.”⁸⁵ He reasons, “What is peculiarly mine in a product of my mind may, owing to the method whereby it is expressed, turn at once into something external like a ‘thing’ which *eo ipso* may then be produced by other people.”⁸⁶ Alienating the physical embodiment of these ideas gives others the right to the ideas contained therein.⁸⁷ But it does not convey the right to make copies. Instead, the owner of a copy of such a thing is only in possession of “that copy *qua* a single thing.”⁸⁸ The author “remains the owner of the *universal* ways and means of multiplying such books and machines, &c.,” which the author “may reserve . . . to himself as means of expression which belong to him.”⁸⁹

Property is thus important to Hegel for the way that it reifies the personality. But it does so not by establishing a special bond between a person and an external object. Instead, the purpose of property is to define a person’s relationship vis-à-vis the external world and other individuals so as not to remain merely abstract.⁹⁰ In other words, property develops personality not by defining a person’s relationship with an object but rather by structuring their relationships with other people.⁹¹

This explains one aspect of Hegel’s theory of property that some have found puzzling,⁹² which is how Hegel could regard property as essential to defining personality while simultaneously regarding alienation of that property as one of the ways that persons can manifest their will over particular objects.⁹³ The reason is that alienation necessarily contains the recognition by others that the

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* (footnote omitted).

86. *Id.* ¶ 68.

87. *Id.*

[B]y taking possession of a thing of this kind, its new owner may make his own the thoughts communicated in it or the mechanical invention which it contains, and it is ability to do this which sometimes (i.e. in the case of books) constitutes the value of these things and the only purpose of possessing them. But besides this, the new owner at the same time comes into possession of the universal methods of so expressing himself and producing numerous other things of the same sort.

Id.

88. *Id.* ¶ 69.

89. *Id.*

90. *Id.* ¶ 71.

91. Schroeder, *supra* note 58, at 457, 461.

92. Hughes, *supra* note 22, at 345.

93. HEGEL, *supra* note 9, ¶¶ 52–53.

property being alienated belongs to the person transferring the property. Again, the intersubjective recognition by others of the person's property rights over the object is what matters, not the relationship with the object itself.

Hegelian property theory thus does not provide a firm foundation for the traditional personhood-based conception of copyright law. Although property plays a fundamental role in defining personality under Hegel's theory, it does so by mediating relationships with other people,⁹⁴ not by establishing particularly strong relationships with the property itself. Although this role does make property an essential aspect of personhood, it provides little guidance as to what property interests should be recognized. For Hegel, it is enough that others recognize that a person possesses *some* property right.⁹⁵ Emphasizing that others must recognize another person's property interest says nothing about what the scope of the property interests should be.⁹⁶

2. *The Lack of Protection for Nonliterary and Derivative Works*

Thus, any insight into Hegel's view of the scope of copyright must derive from his specific writings about the alienability of the products of individual intellect. On these topics, he is far more equivocal than the position reflected in the conventional wisdom about the moral rights conception of personhood and copyright.

Consider, for example, Hegel's views about the limited protectability of physical works of art. Because they require "the portrayal of thought in an external medium," they are necessarily "so peculiarly the property of the individual artist that a copy of a work of art is essentially a product of the copyist's own mental and technical ability."⁹⁷ Thus any copies made necessarily embody the will of the follow-on artist rather than the original artist. This stands in stark contrast to literary works, which can be copied through mere mechanical reproduction that lacks any input from the copyist.⁹⁸ Hegel regarded works of art and literary works as representing opposite ends of a spectrum, with works falling in between the poles as being "transitional stages which to a greater or less degree partake of the character of one or other of the extremes."⁹⁹

Hegel adopted a similar position to derivative works made from literary works. Intellectual works are made to be read by others; indeed, "the purpose of a product of the mind is that people other than its author should understand it and make it the possession of their ideas, memory, thinking, &c."¹⁰⁰ As those who learn from these works to make works of their own, follow-on authors inject their own contribution, giving those works "some special form of its own in every case. The result is that they may regard as their own property the capital asset

94. *Id.* ¶ 71.

95. *Id.*

96. See Schroeder, *supra* note 58, at 476–78; Sterk, *supra* note 2, at 1240.

97. HEGEL, *supra* note 9, ¶ 68.

98. *Id.*

99. *Id.*

100. *Id.* ¶ 69.

accruing from their learning and may claim for themselves the right to reproduce learning in books of their own.”¹⁰¹

The problem was that “there is no precise principle of determination” of the extent to which the new form given a derivative work becomes more important than the contribution of the initial author.¹⁰² Although copyright laws attempt to demarcate this boundary:

The ease with which we may deliberately change something in the form of what we are expounding or invent a trivial modification in a large body of knowledge or a comprehensive theory which is another’s work, and even the impossibility of sticking to the author’s words in expounding something we have learnt, all lead themselves . . . to an endless simplicity of alterations which more or less superficially stamp someone else’s property as our own.¹⁰³

Hegel was particularly critical of anthologies that add nothing of real value “and yet may be claimed as something peculiarly the writer’s own.”¹⁰⁴ “The result of this may easily be that the profit promised to the author . . . by his work or his original idea becomes negligible or reduced for both parties or lost to all concerned.”¹⁰⁵

Hegel’s frustration over where to draw this line eloquently demonstrates his theory’s inability to provide insight into the proper scope of copyright protection. Many functions—such as education—require “the repetition of well-established thoughts . . .” Hegel asked:

[T]o what extent does the new form which turns up when something is expressed again and again transform the available stock of knowledge, and in particular the thoughts of others who still retain *external* property in those intellectual reproductions of theirs, into a private mental property of the individual reproducer and thereby give him or fail to give him the right to make them his *external* property as well?¹⁰⁶

Or, on the other hand, “[t]o what extent is such repetition of another’s material in one’s book a plagiarism?”¹⁰⁷ Simply put, “there is no precise principle of determination available to answer these questions, and therefore they cannot be finally settled either in principle or by positive legislation.”¹⁰⁸ Instead, Hegel concluded that the honor system provided the only viable protections against plagiarism.¹⁰⁹

The foregoing discussion illustrates the problems with the simplistic interpretation of Hegelian theory that supposedly gives copyright protection to creative works because they are extensions of the author’s personhood. Such a theory

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

is inconsistent not only with the logic of Hegel's philosophy; it contradicts Hegel's explicit writings on copyright, which explicitly refuse to accord copyright protection to physical works of art and recognize that derivative literary works may sufficiently reflect the will of follow-on authors to justify regarding it as their property. This is a far cry from the traditional interpretation of Hegel typically associated with moral rights regimes, which focuses solely on the interests of initial authors, giving them rights that are so strong as to be inalienable.

In short, neither Kant nor Hegel offer a sound basis for a vision of copyright and personhood that regards creative works as the embodiment of their creators' personalities and places the highest priority on protecting those interests. Properly read, neither thinker's writings support the idea that having a closer personal connection with a work is a necessary aspect of personality. Moreover, both Kant's and Hegel's specific writings about copyright provide much more nuanced positions, which recognize that the interests of initial authors must be balanced against the contributions made by follow-on authors. The works of Kant and Hegel thus cannot support the conventional wisdom about personhood theory that would protect creative works as extensions of their authors' personality.

III. TOWARD A BROADER CONCEPTION OF PERSONHOOD AND CREATIVE WORKS

The conventional wisdom applying personhood theory to copyright suffers from more than just inconsistency with its putative philosophical foundations. In focusing narrowly on the extent to which a finished work of art embodies its creator's personality, this approach ignores the other ways that creative works can contribute to a given person's sense of self. Most importantly, creative works are important not just as artifacts that are extensions of the will of their creators but also as sources of engagement that can help a person achieve self-actualization. Examining German aesthetic theory rather than property theory makes clear that the heuristic experience of engaging with creative works can also promote personality. This insight is perhaps best embodied in the German aesthetic concept of play (*spiel*) associated with Kant and Schiller, which, in the classic German dualist tradition, serves to unify the conflict between a person's rational and sensual impulses.¹¹⁰

Although the German aesthetic vision of play involved passive contemplation of creative works, later psychologists, aesthetic scholars, and philosophers explored how creating works can play an essential role in promoting self-actualization. Under this vision, play does not consist simply of contemplation of great works but also in actively engaging in creative activity oneself.

110. For an early work that hinted at this idea without developing it, see David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, LAW & CONTEMP. PROBS., Spring 1992, at 139.

A. Creativity and Self-Actualization

The fonts of modern theories of how creativity can develop personality are the work of Kant and Schiller.¹¹¹ Although many developmental psychologists focus on the consequentialist aspects of play,¹¹² such as a release of excess energy,¹¹³ a safety valve for discharging pent-up emotions,¹¹⁴ or the practice of behaviors that will become useful later in life,¹¹⁵ the German tradition values play for its ability to allow each person to develop her or his own sense of self rather than for its ability to promote other more consequentialist values.

1. Kant

The seminal modern statement of how creative works can contribute to human self-actualization appears in the first part of Immanuel Kant's *Critique of Judgment*, in a section entitled the "Analytic of the Beautiful."¹¹⁶ According to Kant, humans experience the "feeling of life," described as the pleasurable experience of being endowed with and exercising a freedom that transcends the world and everything in it, only when they are in a "state of free play" completely free from any restraining concepts.¹¹⁷ Human beings engage in free play when they make "judgments of beauty."¹¹⁸ Beauty is not an inherent characteristic of an object, such as a statement about its shape or its color, which may not evoke any feelings of pleasure at all. Instead, judgments of beauty necessarily represent a person's visceral reactions to the object.¹¹⁹

In addition, judgments of beauty are distinct from statements of preference, which reflect the speaker's appetites and interests. Although such statements also refer to subjective experiences of pleasure produced by objects, the desire to consume or appropriate an object reflects what Kant calls an "interest" in the object. Having an interest in an object makes a person dependent on it.¹²⁰ This dependency draws the person along in a way that makes that person not completely free. It is only when a person's "wants" have been "appeased" that a statement of preference constitutes a true judgment of beauty.¹²¹

111. See generally MIHAI SPARIOSU, *DIONYSUS REBORN: PLAY AND THE AESTHETIC DIMENSION IN MODERN PHILOSOPHICAL AND SCIENTIFIC DISCOURSE* (1989).

112. For a survey, see Dorothy W. Jackson & Henry R. Angelino, *Play as Learning*, 13 *THEORY INTO PRACTICE* 317, 318–20 (1974).

113. HERBERT SPENCER, *THE STUDY OF SOCIOLOGY* 113 (1873).

114. See Konrad Lange, *Illusion in Play and Art*, in *A MODERN BOOK OF ESTHETICS* 5 (Melvin Rader ed., 3d ed. 1960).

115. See KARL GROOS, *THE PLAY OF MEN* 2 (J. Mark Baldwin ed., Elizabeth L. Baldwin trans., 1901).

116. IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 37–81 (J.H. Bernard trans., Hafner Publ'g Co. 1951) (1790). The discussion that follows draws on Anthony T. Kronman, *Is Poetry Undemocratic?*, 16 *GA. ST. L. REV.* 311, 318–26 (1999).

117. KANT, *supra* note 116, at 52.

118. *Id.* at 199.

119. *Id.*

120. *Id.* at 42–43.

121. *Id.* at 44.

Judgments of beauty are also distinct from judgments of moral duty, such as the classic Kantian categorical imperative. Kant writes, “where the moral law speaks, there is no longer, objectively, a free choice as regards what is to be done”¹²² Only judgments that are exercised independently of reason and desires produce the pleasure associated with judgments of beauty.¹²³ Indeed, judgments of beauty are inherently not rule-bound, since there is no rule about what is beautiful and what is not.¹²⁴ Thus, Kant concludes that art is genuine only if it is autonomous.¹²⁵

Instead, judgments of beauty reflect an “entirely disinterested satisfaction” that is a feeling of wholeness and integrity that is fully gratified merely by observing the object.¹²⁶ It is only when people are unconstrained by wants or rules that their cognitive faculties are in a “state of *free play*,”¹²⁷ which Kant describes as “purposiveness without purpose.”¹²⁸ Indeed, conceived in this manner, aesthetic pleasure is the pleasure of freedom itself.

Although judgments of beauty are inherently subjective, the fact that they are disinterested and independent of individual preferences creates the potential for those judgments to be shared by others as well. Kant regarded judgments of beauty as “invitation[s] to others to recognize this same pleasurable power in themselves.”¹²⁹ Indeed, every judgment of beauty contains an aspiration toward universality that is missing from mere statements of preference or personal taste—carrying with it the expectation that others can and ought to share that judgment.¹³⁰ Sharing a judgment of beauty that has the potential to be universally communicable with others who possess the same ability to experience this freedom for themselves creates a shared experience that goes beyond two people reaching the same conclusion after conducting the same scientific experiment. The anticipated pleasure of being in the company of one’s equals and in communication with them gives rise to the pleasure that Kant calls “sociability.”¹³¹

2. *Schiller*

Kant’s work prompted a response from Schiller. Best known as the second-leading figure of German literature (behind only Goethe),¹³² Schiller has long been overlooked as an aesthetic theorist. His early work directly challenged Kant’s subjective vision of aesthetic taste, laying out a theory of art “based on

122. *Id.* at 45.

123. *Id.* at 56.

124. *Id.* at 68.

125. *Id.* at 96, 247.

126. *Id.* at 143.

127. *Id.* at 52.

128. *Id.* at 62.

129. Kronman, *supra* note 116, at 326.

130. KANT, *supra* note 9, at 59.

131. KANT, *supra* note 116, at 139.

132. *See generally* FRIEDRICH SCHILLER, ON THE AESTHETIC EDUCATION OF MAN IN A SERIES OF LETTERS (Reginald Snell trans., 1954) (1793).

principles.”¹³³ Schiller defined beauty as the result of harmony between opposing forces: the physical and the moral, duty, and inclination. He described this harmony as the *Schöne seele* (“beautiful soul”), which is the human product of the synthesis or harmony of opposing drives reconciled through a process of aesthetic education.¹³⁴

In his *Aesthetic Letters*, Schiller focuses explicitly on the concept of play as the means for reconciling these conflicting drives. In explaining his theory of aesthetics as the path to freedom, Schiller discusses the primary elements of human experience as “impulses” (*triebe*).¹³⁵ The form impulse (*formtrieb*) reflects the tendency of the mind toward rational explanations and structure, while the material or sensual impulse (*stofftrieb*) looks to concrete facts for its explanations of the world around it.¹³⁶

The play impulse (*spieltrieb*) is the aesthetic drive that brings together these opposing drives and holds them in tension.¹³⁷ Schiller states the ultimate form of play is in contemplating the beautiful—the process described above through which the viewer can temporarily engage both drives at once—allowing moral and physical constraints to cancel each other out in a way that sets the psyche free.¹³⁸ Thus, for Schiller, the ability to play is representative of freedom. Indeed, “man . . . is only fully a human being when he plays.”¹³⁹ Rather than degrading beauty to a mere frivolity, the term “play” is intended to connote liberation.¹⁴⁰

Together, Kant and Schiller emphasized the importance of the idea of play in the human experience. Under this conception, play is undertaken for its own sake, which stands in stark contrast to the consequentialist visions of play that view play as an outlet for excess or compensation for deficient energy, practice for adult life, a mechanism for the assimilation of information, or some other instrumental purpose.¹⁴¹ Instead, play develops the sense of self directly and is valued for itself.

B. Toward a More Active Vision of Creativity

What is particularly striking about Kant’s and Schiller’s vision of play is its passiveness. Under this conception, play involved the appreciation of great works of art that could only be created by great masters.¹⁴² This so-called Romantic vision of authorship does not recognize any value to individuals’ efforts

133. *Id.* at 124–31.

134. *Id.* at 64–67.

135. *Id.* at 64.

136. *Id.*

137. *Id.* at 76.

138. *Id.* at 77.

139. *Id.* at 80.

140. *Id.*

141. SPARIOSU, *supra* note 111, at 177–78; Lange, *supra* note 110, at 146. *See generally* GROOS, *supra* note 115; Jackson & Angelino, *supra* note 112.

142. SCHILLER, *supra* note 132, at 80; *see also* KANT, *supra* note 116, at 61.

to author creative works on their own, a position criticized for its attempt to justify privileging the positions of authors.¹⁴³

Later theorists would develop more active visions of play. Most important for our purposes are the psychologists, aesthetic theorists, and philosophers who have explored the deep connections between creating expressive works and the development of personality.

1. *Psychology: Maslow, Rogers, and Self-Determination Theory*

Psychology provides perhaps the strongest foundation for the important role that individual authorship of creative works can play in the development of personality, particularly the work of Abraham Maslow and Carl Rogers.¹⁴⁴ Maslow's celebrated study on the hierarchy of needs posits that humans are motivated by the drive to satisfy five basic needs.¹⁴⁵ Only after the more fundamental needs are satisfied can individuals seek to satisfy needs located higher in the hierarchy.¹⁴⁶ At the top of the hierarchy is the need for self-actualization, which "is not necessarily a creative urge although in people who have any capacities for creation it will take this form."¹⁴⁷

Maslow's early work speaks of creative expression as if it were the unique province of artistic people,¹⁴⁸ suggesting that artists find the drive to create so strong that it is never satisfied.¹⁴⁹ Maslow's later work breaks from this limited vision of creativity, emphasizing that self-actualizing creativity was not limited to the artistic class by drawing a distinction between "special-talent creativeness" and "self-actualizing creativeness."¹⁵⁰ Broadening the conception of creativity permits Maslow to recast creativity as "a fundamental characteristic, inherent in human nature, a potentiality given to all or most human beings at birth."¹⁵¹ Under this revised vision, cooks, hostesses, homemakers, social service workers, and

143. Indeed, a leading scholar has attributed this in large part to Schiller's desire for financial self-sufficiency and his frustration at Germany's failure to enact meaningful copyright protection. See Barron, *supra* note 34, at 34 (noting that "Kant's major concern in the 1785 Essay is in fact to legitimize the book trade . . . and the profits that may be realized from it"); MARTHA WOODMANSEE, *AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* 59 (1994) (discussing Schiller's desire to promote his own self-sufficiency by promoting German adoption of copyright law).

144. See, e.g., EDWARD L. MATTIL, *RESEARCH MONOGRAPH #5: THE SELF IN ART EDUCATION* 1, 1 (1972) (citing Maslow and Rogers as the basis for theories connecting creativity and personality); Willet W. Ryder, *The Role of Art in Self-Actualization*, *ART EDUC.*, Mar. 1987, at 22, 22.

145. Specifically, these needs are physiological, safety, love, esteem, and self-actualization. Abraham Maslow, *A Theory of Human Motivation*, 50 *PSYCH. REV.* 370, 394 (1943). He developed it further in A.H. MASLOW, *MOTIVATION AND PERSONALITY* 80–92 (1954).

146. Maslow, *A Theory of Human Motivation*, *supra* note 145, at 394–95.

147. *Id.* at 383.

148. *Id.* at 382 ("A musician must make music, an artist must paint, a poet must write, if he is to be ultimately happy. What a man *can* be, he *must* be. This need we may call self-actualization.").

149. *Id.* at 386 ("There are other, apparently innately creative people in whom the drive to creativeness seems to be more important than any other counter-determinant. Their creativeness might appear not as self-actualization released by basic satisfaction, but in spite of lack of basic satisfaction.").

150. A. H. MASLOW, *MOTIVATION AND PERSONALITY* 158, 160 (3d ed. 1987); ABRAHAM H. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* 137 (2d ed. 1968) [hereinafter MASLOW, *PSYCHOLOGY OF BEING*].

151. MASLOW, *PSYCHOLOGY OF BEING*, *supra* note 150, at 138.

clinical psychiatrists can all be creative in their own way.¹⁵² Maslow noted that “a first-rate soup is more creative than a second-rate painting, and that, generally, cooking or parenthood or making a home could be creative while poetry need not be”¹⁵³ He “learned to apply the word ‘creative’ . . . not only to products but also to people in a characterological way, and to activities, processes, and attitudes.”¹⁵⁴ Indeed, self-actualizing creativeness “stresses first the personality rather than its achievements, considering these achievements to be epiphenomena emitted by the personality and therefore secondary to it.”¹⁵⁵ Creative people “are all integrators, able to bring separates and even opposites together into unity.”¹⁵⁶ The “inner integration of the person” is what permits creativeness to be “constructive, synthesizing, unifying, and integrative.”¹⁵⁷ Indeed, “the creativity of [Maslow’s] subjects seemed to be an epiphenomenon of their greater wholeness and integration”¹⁵⁸

Maslow finds creativity “hard to define because it seems to be synonymous with health itself” and “almost synonymous with, or a *sine qua non* aspect of, or a defining characteristic of, essential humanness.”¹⁵⁹ Although his later work adopts a similar tone,¹⁶⁰ it implies a more causal relationship between creativity and self-actualization, suggesting that creative expression should be part of any educational curriculum “not so much for turning out artists or art products, as for turning out better people,” because the creative process plays a key role in allowing people to “become full human beings” and to “move towards actualizing the potentialities that they have.”¹⁶¹ Maslow further describes how during “the inspirational phase of creative furore,” the creative person “loses his past and his future” and becomes “utterly lost in the present.”¹⁶² When people create, they are “then *most* integrated, unified, all of a piece, one-pointed, totally organized in the service of the . . . matter-[at]-hand.”¹⁶³ “Creativeness is therefore systemic; i.e., a whole—or Gestalt—quality of the whole person”¹⁶⁴ that allows “the fusion [of] the person and his world.”¹⁶⁵ It is at these moments when people

152. *Id.* at 136.

153. *Id.*

154. *Id.* at 137.

155. *Id.* at 145.

156. *Id.* at 140.

157. *Id.*

158. *Id.* at 141; *see also id.* at 144 (arguing for increased emphasis “on the role of integration (or self-consistency, unity, wholeness) in the theory of creativeness”).

159. *See id.* at 145.

160. Abraham H. Maslow, *The Creative Attitude*, 3 THE STRUCTURIST 4, 4 (1963) (“My feeling is that the concept of creativeness and the concept of a fully-human person seem to be coming closer and closer together, and may perhaps turn out to be the same thing.”).

161. *Id.* at 4.

162. *Id.* at 8.

163. *Id.* at 13.

164. *Id.*

165. *Id.* at 15.

are “most fully realizing themselves, most mature and evolved, most healthy, when, in a word, they are most fully human.”¹⁶⁶

Carl Rogers similarly regards creativity as a reflection of “man’s tendency to actualize himself, to become his potentialities.”¹⁶⁷ Rogers notes, “It is this tendency which is the primary motivation for creativity as the organism forms new relationships to the environment in its endeavor more fully to be itself.”¹⁶⁸ The motivation is intrinsic, not extrinsic. Although creativity may be socially beneficial, “the individual creates primarily because it is satisfying to him, because this behavior is felt to be self-actualizing.”¹⁶⁹ Creativity is not the unique province of great works, applying equally to “creating new formings of one’s personality in psychotherapy” as to “painting a picture, composing a symphony, devising new instruments of killing, developing a scientific theory, [or] discovering new procedures in human relationships.”¹⁷⁰ In short, creativity is a capacity that exists in every individual.

Rogers expands on these thoughts in his later work. Like Maslow’s self-actualized person, Rogers views his ideal “fully functioning person” as a creative person “from whom creative products and creative living emerge.”¹⁷¹ In a later book chapter based on this article, he concludes that “a person who is involved in the directional process which I have termed ‘the good life’ is a creative person.”¹⁷² Rogers in turn defines the good life as “the process of movement in a direction which the human organism selects when it is inwardly free to move in any direction, and the general qualities of this selected direction appears to have a certain universality.”¹⁷³

These themes have found modern expression in the Self-Determination Theory (“SDT”) developed by Edward Deci and Richard Ryan¹⁷⁴ and been extended to copyright by Terry Fisher.¹⁷⁵ SDT represents a modern version of theories that regard human behavior as motivated by the need to satisfy innate psychological needs rather than serving instrumental goals.¹⁷⁶ In particular, SDT

166. *Id.* at 6; *see also* A.H. Maslow, *Emotional Blocks to Creativity*, 14 J. INDIV. PSYCH. 51 (1958) (describing how creativity allows the fusion of people’s primary processes, which are unconscious and unbounded, and their secondary processes, which are conscious, rational, and more constrained, thereby achieving the unity that characterizes self-actualized people).

167. Rogers, *supra* note 18, at 251.

168. *Id.* at 252.

169. *Id.*

170. *Id.* at 250.

171. Carl R. Rogers, *The Concept of the Fully Functioning Person*, 1 PSYCHOTHERAPY: THEORY, RES. & PRAC. 17, 23 (1963), *reprinted in* CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST’S VIEW OF PSYCHOTHERAPY 183, 193 (1961). Maslow recognized the connection as well. A.H. Maslow, *A Holistic Approach to Creativity*, in CLIMATE FOR CREATIVITY: REPORT OF THE SEVENTH NATIONAL RESEARCH CONFERENCE ON CREATIVITY 287, 288 (Calvin W. Taylor ed., 1971).

172. ROGERS, *supra* note 171, at 193.

173. *Id.* at 187.

174. *See* Edward L. Deci & Richard M. Ryan, *The “What” and the “Why” of Goal Pursuits: Human Needs and Self-Determination of Behavior*, 11 PSYCHOL. INQUIRY 227, 228 (2000).

175. William W. Fisher III, *The Implication for Law of User Innovation*, 94 MINN. L. REV. 1417, 1465 (2010).

176. Deci & Ryan, *supra* note 174, at 227, 231.

posits that humans are motivated by the need to fulfill three psychological needs: competence, relatedness, and autonomy.¹⁷⁷

In focusing exclusively on psychological needs, SDT excludes behaviors motivated by physiological needs.¹⁷⁸ In addition, SDT focuses on intrinsically motivated activities, defined as “those that individuals find interesting and would do in the absence of operationally separable consequences,”¹⁷⁹ such as “[a] man who, in the evening, sits at the keyboard and begins to play a piece of music, may become lost in its beauty and experience great pleasure.”¹⁸⁰ Deci and Ryan note that “intrinsic motivation is associated with better learning, performance, and well-being.”¹⁸¹ Promoting intrinsic motivation in turn encourages creativity,¹⁸² whereas introduction of external motivations reduces both the sense of self-determination and creativity.¹⁸³ Interestingly, Deci and Ryan argue that individuals can internalize extrinsic motivations in ways that are consistent with need satisfaction so that they in turn become part of their own intrinsic motivation.¹⁸⁴

Together, these scholars view creativity as an innate attribute of fully self-actualized individuals. These people pursue creativity as an end unto itself.¹⁸⁵ Those engaging in self-actualizing creativity become lost in the moment. Indeed, any extrinsic motivation destroys the self-actualizing quality of creativity.¹⁸⁶ The focus is neither on the consequences of the art nor on the tangible output but rather is on how the process of creation itself develops the sense of self.

2. *Art Education*

The belief that art education can help children develop their sense of personhood through creativity stems largely from the work of John Dewey, whose advocacy for active, experiential, socially situated, problem-based learning transformed modern education.¹⁸⁷ In his magnum opus on aesthetics, *Art as Experience*, Dewey rejected the notion of art as an expressive object associated with Kant and the German Idealists.¹⁸⁸ Instead, Dewey favored an approach that viewed art as an experience through a process of experimentation and the finding

177. *Id.* at 228.

178. *Id.* at 229.

179. *Id.* at 233.

180. *Id.* at 230.

181. *Id.* at 233.

182. *Id.* at 258.

183. *Id.* at 234.

184. *Id.* at 235–39.

185. *See, e.g.,* Rogers, *supra* note 18, at 252.

186. *See* Deci & Ryan, *supra* note 174, at 234.

187. *See generally* JOHN DEWEY, *ART AS EXPERIENCE* (1934); David B. Manzella, *John Dewey and the Materialism of Art Education*, 20 *ART J.* 19, 19 (1960).

188. *See generally* DEWEY, *supra* note 187.

of meaning that unites the dualism of the individual.¹⁸⁹ In addition, Dewey rejected the notion that art was the unique province of a chosen few capable of producing it and argued instead that every person can be an artist.¹⁹⁰

It is hard to overstate Dewey's influence on art education. One commentator writing in 1960 called *Art as Experience* "the book in art education" that sets for the "the beguiling refrain of our spiritual mentor" and "has since become the unchallenged base" for art education.¹⁹¹ Following in Dewey's footsteps, aesthetic theorists have emphasized the role that creativity can play in developing each individual's sense of self. Aesthetician Eugene Kaelin writes that "[t]he ultimate value of aesthetic expressions" lay in "the discovery of my own personality: of those feelings (some of which are forced upon me by my environment) which correlate most clearly with my true self. The self, then, must be such as to be developed by expression."¹⁹² Dewey's contemporary, R.G. Collingwood, similarly notes that "an artist creates in order to get his feelings clear," which in turn induces clarity to her psychic conditions.¹⁹³

The key role that creating works can play in personal development has led many scholars to argue that art should represent a fundamental component of every child's education.¹⁹⁴ Some believe artistic expression allows people to explore who they are and what makes them unique.¹⁹⁵ Others echo Schiller, arguing that creating art permits individuals to achieve unity of body and mind.¹⁹⁶ Still others contend that the release of emotion and ideas through creativity permits individuals to become more fully integrated and developed as human beings.¹⁹⁷ This school of thought emphasizes that the process of creation matters more than the product,¹⁹⁸ which has become a theme echoed by modern copyright scholars.¹⁹⁹

189. *Id.* at 6.

190. *Id.*

191. Manzella, *supra* note 187, at 19.

192. EUGENE F. KAELIN, ART AND EXISTENCE: A PHENOMENOLOGICAL AESTHETICS 90 (1970).

193. See R.G. COLLINGWOOD, THE PRINCIPLES OF ART 157–68 (1958).

194. For an overview, see Ryder, *supra* note 144, at 22–24.

195. See MATTIL, *supra* note 144, at 12–13; Frances K. Heussenstamm, *Humanizing Higher Education*, ART EDUC., Mar. 1971, at 17, 18 (1971).

196. See Kenneth R. Beittel, *The Teaching of Art in Relation to Body-Mind Integration and Self-Actualization in Art*, ART EDUC., Nov. 1979, at 18.

197. See Florence Cane, *Art in the Life of the Child*, in CREATIVE EXPRESSION: THE DEVELOPMENT OF CHILDREN IN ART, MUSIC, LITERATURE AND DRAMATICS 42 (Gertrude Hartman & Ann Shumaker eds., 1932).

198. See VIKTOR LOWENFELD, CREATIVE AND MENTAL GROWTH (rev. ed. 1952).

199. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 25, 79 (2008).

3. *Capabilities Theory: Sen and Nussbaum*

Other copyright scholars see a justification for personhood theory in the “capabilities theory” pioneered by economist Amartya Sen²⁰⁰ and extended by philosopher Martha Nussbaum.²⁰¹ This approach places upon the state the obligation to provide every individual with the preconditions they need to flourish and to develop their faculties meaningfully.²⁰²

Some scholars suggest that human dignity only applies to needs lower in Maslow’s hierarchy and does not include copyright;²⁰³ however, Nussbaum’s key aspects of the human condition catalog includes “Senses, Imagination, and Thought,” which encompasses “us[ing] imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth.”²⁰⁴ In her other writings, Nussbaum also includes “Play,” defined as “[b]eing able to laugh, to play, to enjoy recreational activities,” as one of the ten basic capabilities.²⁰⁵ Development of such capabilities is valued for its own sake and not for some consequentialist or extrinsic benefits.

Legal scholars have built on the capabilities theory to argue that copyright should be shaped to ensure that people have the means to be creative. For example, Madhavi Sunder builds on Nussbaum to advocate for a copyright that allows people to produce works that are the product of their own imagination.²⁰⁶ Julie Cohen similarly invokes capabilities theory to argue for structuring copyright so that it allows room for “the play of everyday practice,” in which individuals explore their identity in every aspect of their lives.²⁰⁷ Terry Fisher proposes a series of copyright reforms to ensure that it promotes five values: autonomy, competence, engagement, self-expression, and community.²⁰⁸

These theories all exhibit key differences from the vision set forth in this Article. While each focuses on ensuring that copyright promotes interaction with others in creating meaning,²⁰⁹ the conception advocated in this Article is more

200. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 288 (1999).

201. See MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 78–80 (2000) [hereinafter NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT]; MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 70–76 (2006) [hereinafter NUSSBAUM, FRONTIERS OF JUSTICE]; Martha C. Nussbaum, *Constitutions and Capabilities: “Perception” Against Lofly Formalism*, 121 HARV. L. REV. 4, 7 (2006).

202. See SEN, *supra* note 200, at 38–39, 288; Nussbaum, *supra* note 201, at 6.

203. See Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 45 (1989).

204. NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 201, at 76.

205. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 201, at 80.

206. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 7–8 (2012).

207. COHEN, *supra* note 20, at 50–57.

208. Fisher III, *supra* note 175, at 1466–76.

209. See COHEN, *supra* note 20, at 15, 22–23, 224 (framing the capabilities approach in terms of promoting the “situated self” that both shapes and is shaped by the information environment); SUNDER, *supra* note 206, at 8–10 (arguing in favor of a participatory type of creativity in which individuals collaborate with others to create a shared meaning); Fisher III, *supra* note 175, at 1470–71 (including the promotion of participation as a key value).

intrinsic and operates exclusively within individuals to develop their own capacities. In addition, Cohen's vision encompasses the entire range of human behavior and not just the creation of creative works.²¹⁰

Although these theories are diverse, they share the common perspective that personal involvement in originating creative works plays a critical role in developing a sense of self. In the process, it replaces the passive role envisioned by Kant and Schiller with a broader conception that appreciates that personality is determined as much by the process of creating works as by how the results of those creative processes are treated.²¹¹ Moreover, they suggest that the law would be best served by providing the conditions necessary to allow individuals to engage in such self-actualizing behavior.²¹²

IV. CONCEPTUAL LIMITS TO THE NEED TO PLAY

Recognizing the importance of engaging in creative activity does not by itself determine the proper scope of copyright protection. Indeed, if creativity were the sole product of the author's imagination, each person could simply pursue their own self-actualization without needing any extrinsic resources. To the extent that creative works are adaptations from the extant corpus of creative works, personhood theories arguably support structural copyright law to give individuals sufficient access to prior works to achieve self-actualization. Moreover, to the extent that such works must be read by others or be shared with a community in order to be meaningful, this theory arguably supports a right of dissemination.

A. *The Cumulative Nature of Creativity*

What would the obligation to enable individuals to develop their sense of self by engaging in creative activity entail? Courts and scholars have long recognized how creative works typically borrow from and extend the existing corpus of works. For example, Justice Story once noted:

Virgil borrowed much from Homer, Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.²¹³

210. COHEN, *supra* note 20, at 100.

211. *See, e.g., id.* at 104 ("Autonomy is exercised, and self-determination pursued, by working through culture.").

212. *See, e.g., Fisher III, supra* note 175, at 1466 ("The principal responsibility of a government is to establish a set of social, economic, and political conditions that enable persons to realize these capabilities.").

213. *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) (Story, J.).

Ralph Waldo Emerson similarly noted that “the debt is immense to past thought. None escapes it. The originals are not original. There is imitation, model, and suggestion, to the very archangels, if we knew their history.”²¹⁴

Copyright scholars have frequently noted the extent to which works borrow from prior works when making arguments to limit protection for derivative works.²¹⁵ In particular, a literature has developed critiquing the influence of the Romantic vision of authorship, which regards creativity as springing fully formed from the author’s head.²¹⁶

A classic example of this line of scholarship is Jessica Litman’s article on *The Public Domain*, which observed that “[a]ll works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else’s works” and that “the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.”²¹⁷ Litman notes that such observations in previous scholarship were almost invariably offered in passing without any analysis.²¹⁸ Indeed, Litman has called the insight “such a truism that it has long been a cliché, invoked but not examined.”²¹⁹ Litman proffers a more detailed description of the mechanism through which authors draw on other works subconsciously.²²⁰ Authors create works without distinguishing whether the inspiration resulted from new ideas, past experiences, or works they have read.²²¹ Instead, works are the result of their entire range of experiences filtered through a “combination of absorption, astigmatism, and amnesia.”²²² Rather than being mere “parasitism,” borrowing is “the essence of authorship.”²²³ It also provides a justification for ensuring that current authors have sufficient access to the preexisting corpus of works.²²⁴ Although a literature has emerged challenging how much Romantic authorship has actually influenced U.S. copyright law,²²⁵ these studies

214. Ralph Waldo Emerson, *Quotation and Originality*, in 8 EMERSON’S COMPLETE WORKS: LETTERS AND SOCIAL AIMS 167, 171–72 (1883).

215. See, e.g., Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 218 (1983); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989); Pierre N. Leval, *Commentary, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990).

216. See, e.g., James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CALIF. L. REV. 1413, 1418 (1992); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 40 DUKE L.J. 455, 456 (1991); Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 61 (1988); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 EIGHTEENTH-CENTURY STUD. 425, 426 (1984).

217. Litman, *supra* note 16, at 966.

218. *Id.*

219. *Id.*

220. *Id.* at 1000–01.

221. *Id.* at 1010.

222. *Id.* at 1011.

223. *Id.* at 967.

224. *Id.* at 967, 1012.

225. See Lionel Bently, R. v. The Author: *From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 2 (2008); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in*

have not challenged the inherent cumulative nature of most (if not all) creative works.

While Litman regards the process by which current works build on the preexisting literary corpus as being unconscious, Lawrence Lessig offers a more conscious vision of borrowing moves in his most recent book, *Remix*.²²⁶ Through a series of anecdotes, Lessig celebrates what he calls Read/Write (“RW”) culture, in which people do not just consume culture; they add to it “by creating and re-creating the culture around them.”²²⁷ In contrast to the previous Read Only (“RO”) culture, in which “[a]rtists want their expression framed just as they intend it,” RW culture “asks something more of the audience” in that “[i]t invites a response.”²²⁸ The more participatory culture surrounding RW culture creates a greater level of responsibility²²⁹ and permits children to develop a higher degree of cultural literacy,²³⁰ which Lessig equates to democratic literacy.²³¹ It has the added virtues of allowing kids to create their works within the context of a community and providing them with engaging subject matter to use as the building blocks for learning.²³²

Lessig further argues that “[r]emix is an essential act of RW creativity” and advocates for preserving a right to quote or remix as a “critical expression of creative freedom” that should be preserved.²³³ Although the Internet and digital technologies have opened remix expression to the masses,²³⁴ they have simultaneously given creators of the original works a greater ability to prevent would-be remixers from obtaining access to their works.²³⁵ Although Lessig sees value in professional creativity,²³⁶ he warns that the enhanced level of control culture threatens to stifle the benefits of participation and responsibility associated with amateur creativity.²³⁷ To correct this balance, Lessig advocates adopting a hybrid approach that permits commercial and sharing cultures to coexist.²³⁸ While he speaks in terms of balance, his policy recommendations²³⁹ and the concluding pages of his book²⁴⁰ indicate that Lessig’s primary concern is ensuring that would-be remixers enjoy sufficient access to the raw material they need to create their works.

Early American Copyright, 118 YALE L.J. 186, 189 (2008); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 878 (1997) (book review).

226. See generally LESSIG, *supra* note 199.

227. *Id.* at 28.

228. *Id.* at 85.

229. *Id.* at 86.

230. *Id.* at 80–81, 114.

231. *Id.* at 107.

232. *Id.* at 77–82.

233. *Id.* at 56.

234. *Id.* at 69, 82–83.

235. *Id.* at 98–105.

236. *Id.* at 84–85, 105–06, 291–92.

237. *Id.* at 86; *accord id.* at 22–27.

238. *Id.* at 225–49.

239. *Id.* at 253–73; *accord id.* at 109–14.

240. *Id.* at 293–94.

Fan fiction represents another prominent example of conscious borrowing from the existing corpus of works. Indeed, the intertextuality of fan fiction is not merely implicit. Instead, works of fan fiction consciously quote from a defined archive of works while simultaneously contributing back to it, claiming a specific relationship with that corpus and “pointedly locating themselves within the world.”²⁴¹ Far from being protected by property interests, the world of fan fiction “allows, or even invites, writers to enter it, select specific items they find useful, make new artifacts using those found objects, and deposit the newly made work back into the source text’s archive.”²⁴² Indeed, the fact that an entire community is accessing the same preexisting corpus provides the common bond that holds the community of fan fiction writers together.²⁴³

Together, these theories provide a basis for arguing that individual self-actualization depends on having sufficient access to the preexisting corpus of works. Some argue that the cumulative nature of creativity may be an inevitable aspect of the human condition.²⁴⁴ Others contend that even if borrowing from prior works is not inevitable, it provides certain benefits that are worth promoting as a matter of policy.²⁴⁵ When combined with the arguments discussed above—connecting creativity with the development of personality—both suggest that preventing follow-on authors from obtaining sufficient access to prior works can harm the development of individual personality. Support for this position does not depend on the extreme claim that no true works of independent creation exist. So long as derivative creativity remains an important source of self-actualization, the presence of examples of truly original inspiration would simply recalibrate the proper balance rather than eliminate all need for access to prior works.

B. *The Need for an Audience*

The cumulative nature of all creativity provides one insight into ways that a richer conception of the relationship between personhood and creativity can shape copyright doctrine. If authoring creative works is both essential to self-actualization and requires access to the preexisting corpus of works, one might construct a theory of copyright that limits initial authors’ ability to prevent follow-on authors from creating derivative works.

Such an argument would not necessarily lead to the broad type of access to preexisting works that advocates imagine. Some self-sufficient authors create for themselves and do not care if their work ever finds an audience. Indeed, if the

241. See Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS* 61, 65 (Karen Hellekson & Kristina Busse eds., 2006); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, *LAW & CONTEMP. PROBS.*, Spring 2007, at 135, 143.

242. Derecho, *supra* note 241, at 65.

243. Rebecca Tushnet, *Org. of Transformative Works*, Reply Comment on Proposed Rule for Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 7 (Feb. 2, 2009), <https://cdn.loc.gov/copyright/1201/2008/responses/organization-transformative-works-34.pdf>.

244. See, e.g., Rogers, *supra* note 18, at 251.

245. See, e.g., Tushnet, *supra* note 243, at 6.

act of creation itself is what develops personality, the need for self-actualization would be completely satisfied by a personal use right that did not include any right of dissemination. If anything, the emphasis that the psychological and aesthetic theories discussed above place on disinterestedness, intrinsic motivation, and living in the moment mitigate against such a right to disseminate.

That said, the idea that people will find fulfillment from authoring works that will never be read seems strange. Indeed, scholars as early as Aristotle recognized that “the poets merely follow their public, writing as its wishes dictate.”²⁴⁶ One branch of literary theory suggests that authors inevitably internalize their expectations of their readers’ likely responses into their work.

1. *Internalizing the Audience’s Expected Reaction*

Anyone who has written or spoken in public appreciates how the nature of the audience can affect the content of the speech. Invocation of the audience typically calls to mind the insights of reader-response theory, in which readers and audiences play an active role in determining a work’s meaning.²⁴⁷ As Walter Ong noted, while the audience’s response is immediate for oral presentations, for written works, any response from the audience remains “remote and initially conjectural,” which in turn requires authors to internalize some fictionalized conception of the likely audience.²⁴⁸

Even scholars writing in the reader-response tradition recognize that readers do not yet play active roles when a work is being drafted.²⁴⁹ For example, Wolfgang Iser discusses how authors initially write for an “implied reader.”²⁵⁰ Unlike intended readers, which reflect the author’s aims, and hypothetical informed readers, whose qualities are socially determined, Iser’s implied reader has predispositions entirely laid down by the text itself and independent of any “outside reality.”²⁵¹ In contrast to the insight that “literary texts take on their reality by being read,” the implied reader is “a textual structure anticipating the presence of a recipient without necessarily defining him” that “prestructures the role to be assumed by each recipient. . . .”²⁵² Quite aside from any actual reader, the implied reader is a “role offered by the text” that provides a “a frame of reference within which individual responses to a text can be communicated to others,” thereby “provid[ing] a link between all the historical and individual actualizations of the text and mak[ing] them accessible to analysis.”²⁵³ From this

246. Aristotle, *Poetics*, in *THE RHETORIC AND THE POETICS OF ARISTOTLE* 219, 121–28, 239 (W. Rhys Roberts & Ingram Bywater trans., Modern Library 1954) (c. 350 B.C.E.); see also Aristotle, *Rhetoric*, in *THE RHETORIC AND THE POETICS OF ARISTOTLE*, *supra*, at 19, 54–56 (emphasizing the importance of tailoring one’s argument to the audience).

247. See, e.g., Walter J. Ong, *The Writer’s Audience Is Always a Fiction*, 90 *PMLA* 9, 10, 12, 16 (1975).

248. *Id.*

249. *Id.* at 17.

250. See generally WOLFGANG ISER, *THE IMPLIED READER: PATTERNS IN COMMUNICATION IN PROSE FICTION FROM BUNYAN TO BECKETT* (1974).

251. WOLFGANG ISER, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* 34 (1978).

252. *Id.*

253. *Id.* at 36, 37–38.

perspective, even gaps that remain for readers to fill are part of the strategy of the author and thus under his or her control.²⁵⁴

Ong's and Iser's vision of the role of audiences is more consistent with the purely internal motivations of authors (rather than the external social meaning) that are the focus of personhood theory than it is with traditional reader-response theory. The likely response of future readers and audiences does influence authors, but does so in a nonrecursive manner that authors internalize into their intrinsic motivations when authoring the work.²⁵⁵

This vision, however, begs an important question: is it enough for authors to internalize the role of the expected audience, or must the work actually be read in order for authorship to be self-actualizing? Ong's and Iser's focus on the external question of the interpretation of texts leads them not to offer an answer.²⁵⁶

One possibility is that authors may be so self-directed and may have so completely internalized extrinsic motivations that they write for themselves and may not care if their work ever finds a real-world audience. If so, personhood theory would not imply any right of dissemination. Another possibility is suggested by game theory, which has long recognized that the anticipation of the consequences of choices can cause equilibria to unravel.²⁵⁷ Authors whose works are never read will find that the process of anticipating their audience's reaction was an entirely hypothetical exercise. If they only realize this after the fact, they will have already gained the benefits with respect to self-actualization. More discerning authors who understand the overarching structure may be able to anticipate that the law will prevent them from sharing their works with others. This realization may demotivate certain authors, which in turn may prevent them from realizing the self-actualizing benefits of authorship.

2. *Valuing Community*

Another justification for the right to dissemination is implicit in the importance of community associated with remix and fan fiction cultures. Although saying that new works tend to build on prior works can justify a right of access to an existing corpus, to the extent that the process is internal to the author, it does not imply any right to share those works. Consider the remix culture, which Lessig embraces because of the manner in which it promotes responsibility, cultural literacy, and the democratization of content creation.²⁵⁸ These values could arguably be satisfied by a personal use right that authorizes access to prior works for private purposes but forbids any publication of those works.

254. Peter J. Rabinowitz, *Reader-Response Theory and Criticism*, in *THE JOHNS HOPKINS GUIDE TO LITERARY THEORY AND CRITICISM* 606, 606 (Michael Groden & Martin Kreiswirth eds., 1994).

255. Deci and Ryan note, moreover, recursive processes often cause such external considerations to be internalized. See *supra* note 174 and accompanying text.

256. See generally, ISER, *supra* note 250; Ong, *supra* note 247.

257. For the classic work, see generally Reinhard Selten, *The Chain Store Paradox*, 9 *THEORY & DECISION* 127 (1978).

258. See LESSIG, *supra* note 199, at 80–81, 86–88, 107, 114.

Lessig's argument invokes a second conceptual premise to support a right of dissemination: the value of creating content in a community in which members create for one another and help each other learn how to create.²⁵⁹ His success model is the anime subculture of Japan, in which children begin by making and sharing their own sketches with others and then are introduced to the larger subculture by an older child.²⁶⁰ The result is that creators see themselves as participants in a self-supporting community.²⁶¹ Indeed, "the pleasures of production of transformative works are intrinsic to participating in a creative community rather than motivated by extrinsic financial rewards."²⁶²

Community plays an even more central role for fan fiction, whose participants define themselves by a shared interest in a common body of work.²⁶³ Many discussions of fan fiction emphasize the distribution of authorship and the centrality of a community of interpreters, who are also authors.²⁶⁴ Other members of the community provide feedback that helps new authors improve, with the shared desire for additional commentary on the common source material serving as the glue that holds the community together.²⁶⁵ Engagement with this larger community is particularly important for younger authors, who learn from engaging with other members.²⁶⁶ While many creators regard creating fan fiction "as an end in itself, and may only share their videos with a few close friends," many create in order to obtain recognition and status that can only be achieved through approbation by a community characterized by an elaborate subculture that is quite hierarchical, stratified, and governed by a core group of elites.²⁶⁷

The presence of community makes the dynamics surrounding fan fiction somewhat complex. Although peer production is often lauded for its democratic qualities and accessibility to everyone,²⁶⁸ like all social practices, every community of peer production is embedded in a structure with its own sets of rules. In the case of fan fiction, the ability to participate in a larger community in which

259. *Id.* at 77.

260. *Id.* at 79.

261. *Id.* at 80.

262. Mizuko Ito, *The Rewards of Non-Commercial Production: Distinctions and Status in the Anime Music Video Scene*, FIRST MONDAY (May 3, 2010), <http://firstmonday.org/ojs/index.php/fm/article/view/2968/2528>.

263. Tushnet, *supra* note 243, at 7.

264. See Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 NOTRE DAME L. REV. 2133, 2140 (2011).

265. Karen Hellekson, *A Fannish Field of Value: Online Fan Gift Culture*, 48 CINEMA J. 113, 115–16 (2009) (describing how "[w]riter and reader create a shared dialogue that results in a feedback loop of gift exchange, whereby the gift of artwork or text is repetitively exchanged for the gift of reaction, which is itself exchanged, with the goal of creating and maintaining social solidarity"); Ito, *supra* note 262, at 12 (noting how elite fan fiction writers "look to their peers for ongoing feedback and critique" and "acknowledge the importance of social support within the creative community"); Tushnet, *supra* note 241, at 143 n.32 (discussing the value that fan fiction authors place on the "centrality of a community of interpreters" connected through "immediate feedback, constant discussions of underlying canon, and self-identification as members of a fandom based on particular source texts"); Tushnet, *supra* note 243, at 7.

266. See Tushnet, *supra* note 243, at 7.

267. Ito, *supra* note 262, at 11–12.

268. See LESSIG, *supra* note 199, at 84–85 (contrasting RW culture with the presence in RO culture with authoritative sources of interpretation); *id.* at 87–88 (arguing that RW culture "hides the hierarchy," unlike RO culture, which "emphasizes the hierarchy").

transformative works can be shared and can receive feedback plays a central role in constituting the subculture.²⁶⁹ This reasoning does not lead to a rule of access in all contests. Indeed, it only applies to subcultures in which the cycle of publication and feedback is central to the subculture. Moreover, the fan fiction community insists that any such sharing be noncommercial.²⁷⁰ Subject to these limitations, the example of fan fiction provides some support for a limited right of dissemination.

V. IMPLICATIONS FOR THE PERSONHOOD-BASED THEORIES OF COPYRIGHT

Reconceptualizing personhood-based theories in the manner proposed in this Article would place them on a sounder conceptual footing. Not only does it accord better with the philosophical writings on which personhood theory purports to be based; as discussed in Section A below, it recognizes that creativity can affect personality in more ways than just how the outputs of the process are treated after they have been created. It accommodates the interests of follow-on authors in a way that the conventional wisdom cannot. And it provides an affirmative basis for mandating access to the existing body of creative works.

While my theory does support those normative implications, at the same time, its logic suggests a number of important limitations. Specifically, it suggests that any right of access be limited to noncommercial works, educational purposes, and only as much dissemination as necessary to serve the values of community.

A. *Insights*

Adopting a broader sense of the ways that creative works can promote personhood yields several important insights. The revised theory reveals that creative works develop personhood not just in the way they are treated after they have been created but also through the process by which they are created. Self-actualization becomes a heuristic journey of experimentation and discovery and not just a matter of the degree of control over a static artifact. These insights in turn have important implications for copyright law.

1. *Creativity as a Process, Not an Artifact*

The traditional view of personality theory takes a very narrow conception of the relationship between creative expression and personality that focuses exclusively on how works are treated after they have been created.²⁷¹ In essence, this approach treats works as static artifacts that are mere repositories of their

269. See Hellekson, *supra* note 265, at 115–16.

270. See *id.* at 114–15; Rebecca Tushnet, *Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 1, 3 (2008).

271. See *supra* note 9 and accompanying text.

creators' personalities.²⁷² The revised conception adopts a broader view that recognizes that the process of creating works can also play an important role in developing personality.²⁷³ In so doing, it embodies a more heuristic view of creativity that focuses less on the results and more on the creative process itself.²⁷⁴

2. *Greater Importance to Follow-On Authors*

Another shortcoming of the conventional wisdom regarding personhood theory is that it places almost exclusive importance on the interests of the initial author. Indeed, the interest of the initial author is often regarded as being so strong as to convey absolute, inalienable control over derivative works.²⁷⁵

Kant's and Hegel's reluctance to recognize strong interests in derivative works acknowledges that derivative works reflect the personalities of follow-on authors as much as initial authors. Indeed, the process-oriented perspective on personhood reflected in the psychological, aesthetic, and philosophical literature shifts the focus away from creative works as static artifacts and instead reconceives of them as essential contributors to a dynamic process of self-actualization.

3. *An Affirmative Theory of the Public Domain*

The final and most important advantage of my proposed reconceptualization of personality theory is its potential to provide an affirmative theory of the public domain, the absence of which both proponents and opponents of the trend toward broader copyright protection have widely regarded a weakness.²⁷⁶ As noted above, the public domain has often been defined as the residuum left after property rights have been defined. To the extent that property justifications are economically focused, the scope of fair use naturally contracts as technological advances reduce transaction costs.²⁷⁷

The broader conception I propose supports reforming copyright in ways that reflect the full range of ways that creative works can promote self-actualization. By recognizing how creating works can both develop personality and require access to preexisting works, my approach to personality theory provides a justification for providing follow-on authors with access to the extant corpus of creativity. To the extent that those works must be shared with others in order to be meaningful, it also supports a right of dissemination.

272. See *supra* note 9 and accompanying text.

273. See *supra* notes 15–17 and accompanying text.

274. See *supra* note 119 and accompanying text.

275. See *supra* note 7–8 and accompanying text.

276. See *supra* notes 15–17 and accompanying text.

277. See, e.g., Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 116, 130–32 (1997).

B. Limits

At the same time that any theory implies certain types of reform, it also necessarily suggests the natural limits of those reforms. These limits come in part from the internal logic of the theory and in part from factors external to the theory that cut in the opposite direction. The presence of these internal limits and countervailing considerations offer natural reference points for determining the proper scope of any reforms taken in the name of my revised vision of personhood theory.

1. Intrinsicness and Noncommerciality

One major limit is the extent to which any personhood-based rights of access and dissemination must be intrinsic and noncommercial. Commerciality has long presented a puzzle for copyright law.²⁷⁸ Some early cases regarded the fact that a work's commercial uses presumptively fall outside of fair use.²⁷⁹ Later cases clarified that the fact that a work is commercial in nature does not by itself disqualify derivative works from falling within fair use.²⁸⁰

The internal logic of how creating works can develop personality suggests limiting the right of access to noncommercial uses. Kant's initial exposition of how creative works can develop personality emphasized that the experience must be disinterested from personal wants and needs.²⁸¹ Psychological theory emphasizes that individuals can only pursue self-actualization after their more instrumental needs have been satisfied and that such self-actualization can only occur when people live in the moment, creating for its own sake and without any focus on the implications for the future.²⁸² Consistent with this insight, the recent legislation adding an express exception for user-generated content is restricted to noncommercial uses.²⁸³

Lessig similarly focuses on the differences between commercial and gift cultures, emphasizing the differences in values²⁸⁴ and observing that "price is poisonous" to reciprocal noncommercial cultures.²⁸⁵ While Lessig would not limit access rights to noncommercial uses,²⁸⁶ only noncommercial uses would be free, with those making commercial remixes having to pay a compulsory license

278. See, e.g., *id.* at 117–21.

279. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

280. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583–85 (1994).

281. See *supra* note 116 and accompanying text.

282. See Deci & Ryan, *supra* note 174, at 233; Maslow, *The Creative Attitude*, *supra* note 160, at 6; Rogers, *supra* note 18, at 252.

283. Copyright Act, R.S.C. 1985, c. C-42 § 29.21(a)–(d) (Can.).

284. LESSIG, *supra* note 199, at 118, 143–49, 232, 239.

285. *Id.* at 149.

286. *Id.* at 56.

fee.²⁸⁷ Indeed, Lessig's recognition of the benefits associated with commercial creativity necessarily entails some type of balance.²⁸⁸

The rationale for allowing authors to share works created from other works also militates against including commercial works within its scope. As noted earlier, the fan fiction community has adopted a strong norm against commercial uses as inconsistent with the reciprocity of exchange.²⁸⁹ Indeed, many regard commercial compensation as inconsistent with the reciprocal values that undergird the fan fiction community.²⁹⁰

The internal logic of this vision of personhood suggests limiting any access and dissemination rights to noncommercial uses because the need for self-actualization would be satisfied by the noncommercial uses. Although some suggest that the distinction between these commercial and noncommercial uses may prove slippery,²⁹¹ personhood justifications do not support a broader set of reforms.

2. *Broader Permissiveness for Educational Uses*

Another limitation implicit in some portions of the theory is an emphasis on education. For example, education plays a key role in Lessig's lauding the fact that remix allows children to learn through materials they find particularly interesting, noting that "[w]hen kids get to do work that they feel passionate about, kids (and, for that matter, adults) learn more and learn more effectively."²⁹² This sharing helps develop cultural literacy and serves as a form of apprenticeship in which they actually learn more.²⁹³ Although Lessig does offer a nod toward adult learning, his rationale applies with special force to the education of children.

Rebecca Tushnet similarly emphasizes education when enumerating the benefits of fan fiction.²⁹⁴ Fan fiction creates "a unique opportunity for learning, personal expression, and individual autonomy."²⁹⁵ Participation also enhances health so "that we should encourage these kinds of social institutions for youth."²⁹⁶ Adapting preexisting stories also helps children develop cultural literacy.²⁹⁷

287. *Id.* at 254–56; *see also id.* at 110–14 (describing how compulsory licensing would have benefitted remix culture).

288. *See supra* note 238 and accompanying text.

289. *See supra* note 265 and accompanying text.

290. Hellekson, *supra* note 265, at 115.

291. *See Fisher III*, *supra* note 175, at 1433–35; Tushnet, *supra* note 243, at 3–4.

292. LESSIG, *supra* note 199, at 80.

293. *Id.* at 81. Lessig notes how John Philip Sousa celebrated amateur musicianship "because it produced a musical culture: a love for, and an appreciation of, the music he re-created, a respect for the music he played, and hence a connection to a democratic culture." *Id.* at 27.

294. Tushnet, *supra* note 243, at 7.

295. *Id.*

296. *Id.*

297. *Id.*

To the extent that these rationales emphasize education, they impose natural limits on the scope of any reforms implied by the theory. Although they would favor extending broader access for those engaging in creative self-development, they would provide less support for extending rights of access and dissemination to noneducational contexts.

3. *Implicit Limits to the Rights of Access and Dissemination*

Lastly, saying that personhood theory implies a right of dissemination is not to say that such a right should be unlimited. On the contrary, the presence of countervailing considerations (such as the benefits of commercial authorship recognized by Lessig)²⁹⁸ suggests that any such rights be limited to the amount necessary to support self-actualization.

One such limitation would be that any right to create derivative works must be balanced against protecting the rights of the initial authors. For example, in recognizing that follow-on authors may make a sufficient contribution to justify trumping the interests of initial authors, both Kant and Hegel implicitly recognize that initial authors have personality interests that are not overcome until the interests of follow-on authors become sufficiently important. Any other conclusion would sidestep the problems of giving exclusive primacy to the interests of initial authors to only fall into the opposite trap of giving exclusive primacy to the interests of follow-on authors.

The same could be said for any personhood-based right of dissemination. Recognizing that content must be shared with a community to be meaningful does not necessarily entail an unlimited right to disseminate. On the contrary, any such right would naturally be limited to the amount the community needs for authorship to be meaningful. For example, while the role of the implied reader recognized by literary theory may require that the derivative work be read by someone in order to promote self-development, it does not necessarily require that the work be available to the broadest possible audience. Instead, the presence of competing interests dictates that the dissemination right would be limited to the smallest possible number of readers needed to allow the creative process to be self-actualizing. Similarly, any need to share creative works with a community would logically be limited to that community. It would not entail a right to disseminate works more broadly.

These inherent limits underscore the value of any good theory. Any arguments used to justify a position necessarily only go so far. The scope of the reasoning thus inevitably includes its own limitations. Proper application of personhood theory thus requires a clear understanding of why certain reforms are justified and a readiness to cease advocating for further reform after those rationales have been exhausted.

298. See generally LESSIG, *supra* note 199.

VI. CONCLUSION

Personhood theory occupies a central place in copyright theory. Enshrined in the institution of moral rights, personhood theory is widely regarded as giving initial authors absolute, inalienable control over many aspects of their works.²⁹⁹

In this Article, I have argued that the conventional wisdom about personhood and copyright justifications suffers from some fundamental problems. As an initial matter, it is based on an erroneous philosophical provenance. Although personhood-based justifications for copyright are usually attributed to Kant and Hegel,³⁰⁰ a close reading of Kant's and Hegel's theories and, even more importantly, their writings on unauthorized copying belie any such one-sided interpretation.

Even more importantly, the classic view adopts too narrow a vision of the ways that creative expression contributes to personality. It fails to recognize how the process of creation can play a role that can be as important as how works are treated once they have been created. In so doing, the conventional wisdom adopts a view that focuses exclusively on initial authors³⁰¹ without taking the interests of follow-on authors into account.

My reconceptualization of personhood theory accords better with the theory's purported philosophical roots. It adopts a broader conception of personhood that considers a broader range of ways that creativity can foster personal development. It takes the interests of follow-on authors seriously by embracing how creativity often builds on the corpus of prior works. In so doing, it offers an affirmative theory of why copyright law should provide access to existing works. The importance of readers and the need for authorship within a community arguably supports a right of dissemination.

Like any theory, the revised conception of personhood theory carries with it limits as well as justifications. It suggests that any such rights be limited to noncommercial and educational uses. Moreover, rights of access and dissemination should be limited to the amount necessary for follow-on authors to develop their personalities. As with any initial attempt to rethink an area of law, many of the ideas presented here are somewhat exploratory and will no doubt be refined, extended, and criticized in the future. I certainly expect that this will be the first rather than the last word in a long debate.

299. See *supra* note 294 and accompanying text.

300. See *supra* Part II.

301. See *supra* note 7 and accompanying text.

