

# AN ENTREPRENEURSHIP THEORY OF COPYRIGHT

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## ABSTRACT

The dominant utilitarian formulation of copyright incentives is preoccupied with reducing copyright's social costs by limiting an author's income to the precise amount necessary to incentivize production of a particular work. Under that approach, the grant of copyright is considered by many to be social waste when authors create for intrinsic reasons. This Article argues that viewing isolated "persuasion costs" as the absolute determinant of authorial deserts largely ignores the full range of authorial risks and investments and the effect of incentives across the entire copyright ecosystem. Authors are economic speculators akin to entrepreneurs; thus, entrepreneurship theory provides a richer theoretical framework for understanding copyright's incentive function. Authors, like entrepreneurs, innovate and bear economic risk in the face of market uncertainty. Because their economic activities are speculative, authors and entrepreneurs rely on uncertain compensation via property rights in lieu of dependable salaries or wages. Further, entrepreneurial profit entitlements do not hinge on the entrepreneur's intrinsic or extrinsic motivations; one may start a venture for intrinsic reasons and still bear substantial risk. Entrepreneurs' risk bearing and innovation—not their motivations—trigger their profit entitlements. Although there are differences between copyright and the entrepreneur's right to profit—most importantly that copyright is state intervention in free markets for information goods that leads to unique static and dynamic costs—these differences are not fatal to the analogy between authors and entrepreneurs. Copyright is therefore best viewed not as an incentive for discrete acts of creation but rather as the author's compensation for the economic value added by the risk-laden reallocation of resources toward the authorial endeavor. Copyright thus incentivizes the author and partnering intermediaries to bear the commercial risk entailed in shepherding a work from conception to a realized, marketable information good.

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## I. INTRODUCTION

The aspiring writer who forgoes a steady paycheck for two years to write a prospective hit novel shares many similarities with the startup founder who devotes their time and energy in hopes of building a fledgling business into a “unicorn.”<sup>1</sup> Both are engaged in a fundamentally creative act. Both aim to produce something with social and economic value. Both speculate, making in-kind and capital investments with the hope of gain while facing substantial risk as well as financial and opportunity costs. Both are unlikely to maximize the potential value of their enterprises without help from a wider network of partners: editors, agents, publishers, marketers, and distributors for novelists; and employees, advisors, and venture capital investors for startup founders.

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1. “Unicorn” is investor-speak for a startup company with a valuation of over \$1 billion. *Unicorn*, INVESTOPEDIA, <https://www.investopedia.com/terms/u/unicorn.asp> (Dec. 21, 2017).

The point of copyright is to help authors bring new innovations to market under a cloud of commercial uncertainty. The parallels with entrepreneurship are unmistakable.

Legal and economic theory seem blind to these parallels, however. Although there is a wealth of literature on patents and their role in entrepreneurial innovation and commercialization,<sup>2</sup> the literature on the connection between entrepreneurial theory, innovation, and copyright in the creative industries is virtually nonexistent. Instead, the legal and economic literature seem to view the processes of entrepreneurship and authorship as entirely different. Both literatures therefore ignore the great conceptual overlap between authors and entrepreneurs.

The utilitarian view of copyright incentives that predominates in the United States holds that efficiency necessitates authors' rewards be limited to the precise level needed to incentivize them to create new works. Any rewards that exceed the level necessary to incentivize the production of a given work are social waste.<sup>3</sup> As Jeanne Fromer puts it, "For society's benefit, intellectual property utilitarians seek to award the least incentive possible in exchange for a requisite degree of valuable artistic . . . creation."<sup>4</sup> This copyright incentive formulation is not only mainstream among legal theorists but also among economists.<sup>5</sup>

Entrepreneurship theorists, by contrast, do not concern themselves with questions about the optimal level of rewards needed to incentivize entrepreneurial activity.<sup>6</sup> Asking whether entrepreneurs would apply themselves even if they receive no ownership interest in their ventures is not

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2. See, e.g., Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977); Ted Sichelman, *Commercializing Patents*, 62 STAN. L. REV. 341 (2010); Camilla A. Hrday, *Commercialization Awards*, 2015 WIS. L. REV. 13, 17 (2015); Ted Sichelman & Stuart J.H. Graham, *Patenting by Entrepreneurs: An Empirical Study*, 17 MICH. TELECOMM. & TECH. L. REV. 111 (2010); Stuart J.H. Graham, Robert P. Merges, Pamela Samuelson & Ted M. Sichelman, *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERKELEY TECH. L.J. 1255 (2009); Michael J. Meurer, *Inventors, Entrepreneurs, and Intellectual Property Law*, 45 HOUS. L. REV. 1201 (2008).

3. See GLYNN LUNNEY, *COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY* 17–19 (2018).

4. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1747–48 (2012).

5. See, e.g., JEAN TIROLE, *ECONOMICS FOR THE COMMON GOOD* 434 (2017) (describing intellectual property as a "necessary evil to provide incentives for R&D and artistic creations" that "has to remain true to that objective").

6. Joseph Schumpeter does raise the issue in passing and summarily dismisses it as pointless to pursue. See *infra* notes 146–148 and accompanying text.

a serious question in the field.<sup>7</sup> Economic literature on entrepreneurship hails entrepreneurs as key drivers of economic growth<sup>8</sup> and treats their right to the proceeds of their ventures as unqualified and self-evident.<sup>9</sup> No one asks to what extent money motivated Sergey Brin and Larry Page to found Google and suggests their rights to profits should be curtailed accordingly. To the extent entrepreneurship literature probes entrepreneurial incentives, it seeks to understand the entrepreneurial process and how and why entrepreneurs become alert to new opportunities, typically with the aim of better understanding the entrepreneur's role in the macroeconomy or how to facilitate more entrepreneurial activity.<sup>10</sup> Pondering how to achieve public policy objectives by tethering entrepreneurs' entitlements to ex ante incentives is simply not part of the theory of the entrepreneur. If, however, an actor is classified as an *author*, economists and legal scholars feel licensed to dig deeply into incentives and make sweeping policy prescriptions based thereon.

The consequences of this double standard are profound for copyright theory. Many copyright scholars argue that copyright proceeds should be capped at authors' "persuasion costs"—the precise amount necessary to motivate the author to produce a given work—and no more.<sup>11</sup> In its strongest

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7. See Raphael Amit, Lawrence Glosten & Eitan Muller, *Challenges to Theory Development in Entrepreneurial Research*, 30 J. MGMT. STUD. 816 (2003) (discussing the questions that animate the field of entrepreneurship studies).

8. See Christopher Brown & Mark Thornton, *How Entrepreneurship Theory Created Economics*, 16 Q.J. AUSTRIAN ECON. 401, 402 (2013) (“[M]ost scholars recognize that entrepreneurship is the driver of economic growth and progress . . . [and] also creates information, knowledge, and even economic wisdom.”).

9. See FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 23 (Augustus M. Kelly 1964) (1921).

10. See generally, e.g., ISRAEL M. KIRZNER, THE PRIMACY OF ENTREPRENEURIAL DISCOVERY (1980); Dennis P. Leyden & Albert N. Link, *Toward a Theory of the Entrepreneurial Process*, 44 SMALL BUS. ECON. 475 (2015); Mathew McCaffrey, *On the Theory of Entrepreneurial Incentives and Alertness*, 37 ENTREPRENEURIAL THEORY & PRAC. 891 (2013); Steffen Korsgard, *Entrepreneurship as Translation: Understanding Entrepreneurial Opportunities through Actor-Network Theory*, 23 ENTREPRENEURSHIP & REG’L DEV. 661 (2011).

11. See, e.g., LUNNEY, *supra* note 3, at 205 (proposing copyright reforms that limit royalties once a songwriter’s “persuasion costs” are recouped, since songwriters sated with success may be less productive); Tom W. Bell, *Indelicate Balancing in Copyright and Patent Law*, in COPY FIGHTS 1, 6 (Adam Thierer & Clyde Wayne Crews, Jr. eds. 2002) (arguing that copyright is “creators’ welfare” and therefore “we ought to withdraw copyright . . . protections when and if they prove redundant”); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005) (“[T]he proper goal of intellectual property law is to give as little protection as possible consistent with encouraging innovation.”); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1574–75 (2009) (arguing incentive theory necessitates that copyright rights and remuneration should be limited to uses

form, such a prescription necessitates that a work be denied protection if its author would have created it for intrinsic reasons apart from any extrinsic pecuniary incentives copyright's exclusive rights afford. Thus, the song written only to express love, the opus composed purely out of spite,<sup>12</sup> the painting rendered purely for self-expression, or the novel penned for fun without expectation of financial reward would all go unprotected. After all, to protect these works, the argument goes, would bestow a windfall on authors who would have created them regardless of copyright protection.<sup>13</sup>

The genesis of this Article was my investigation into why, in two parallel fields of study, the field-defining question in one is considered a non-issue in the other. This Article identifies how the economic literature defines “entrepreneur” and how it theorizes the interplay between entrepreneurship, property rights, and incentives. The conclusions are illuminating for copyright theory. First, entrepreneurs’ defining traits are that they (1) bear commercial risk in the face of market uncertainty and (2) innovate. Second, entrepreneurs are recognized as unique economic actors who forgo the stability and predictability of salaries or wages to bear the risk of starting and operating a venture in the face of market uncertainty. Because entrepreneurs receive no set wages or salaries, their sole guaranteed compensation for risk bearing is a claim to the venture’s profits—a claim that arises from their property rights in the venture.

Authorship is akin to entrepreneurship in all these respects. Authors, like entrepreneurs, bear the risk of commercial production in the face of market uncertainty, and they innovate. Copyright income—like entrepreneurial profit—is not predictable contractual income such as a salary or wage. It is

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foreseeable by authors at the time of creation); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 3 (2008) (advocating “less robust, or ‘thin,’ copyright protection for those types of works that do not require the incentive of the copyright to be created and distributed”); Abraham Bell & Gideon Parchomovsky, *The Dual-Grant Theory of Fair Use*, 83 U. CHI. L. REV. 1051, 1057 (2016) (“[T]he optimal fair use doctrine would limit rights strictly to those necessary to incentivize creation, while leaving the public to consume copyrighted works without restriction beyond that minimum.”); Fromer, *supra* note 4, at 1745, 1798–99 (2012).

12. See William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 2 & n.1 (noting that Richard Strauss’s vitriolic *Der Krämerspiegel* was written exclusively to spite his publisher for pressuring him to fulfill a longstanding commitment to compose a song cycle).

13. See, e.g., Glynn S. Lunney, Jr., *Copyright Lost*, 59 IDEA 193, 212 (2018) (arguing that copyright in sound recordings is unjustifiable because empirical evidence shows increased rents from copyright reduced the output and quality of music while “forc[ing] consumers to pay more for works of authorship that would have existed in any event, even in the absence of copyright”); Bell, *supra* note 11, at 6; MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 7 (2008).

property-derived income because the market for the work is unknown and unknowable at the time of creation. When authors decide to engage in authorship, they do not even know the final form of the works they will produce, much less the potential market reception for those as-yet-unknown works.<sup>14</sup> Their copyright is the sole guaranteed compensation authors receive in return for the economic value they add through the risk-laden reallocation of resources toward authorial endeavors.

The standard utilitarian incentive formulation—that the author’s isolated persuasion costs are the absolute determinant of authorial deserts—underestimates the full range of creators’ investments and risks and the role of copyright in incentivizing risk bearing across the copyright ecosystem. In the utilitarian account, if people create for intrinsic reasons, the grant of copyright is social waste. In entrepreneurship theory, by contrast, profit is not conditioned on the existence of external pecuniary incentives. Profit motive is recognized as an important incentive for entrepreneurship, but it is well accepted that entrepreneurs respond frequently, if not primarily, to intrinsic motivations.<sup>15</sup> No matter—one may start a venture for intrinsic reasons and still bear substantial risk. Entrepreneurial profit is justified as entrepreneurs’ reward for the risk they bear by forgoing secure employee wages or salaried jobs, as well as for their innovation.<sup>16</sup> The presence of risk bearing and innovation alone justifies the property entitlement, irrespective of motivations. Likewise, the author’s risk bearing and innovation justify copyright—the author’s profit mechanism—regardless of authorial motivations.

One advantage of viewing copyright incentives through the lens of entrepreneurial risk bearing is that it provides a better theoretical account of the role copyright plays for small and medium-sized creators. These creators fit poorly into the utilitarian narrative because they often create for intrinsic reasons and their sunk costs are considered trivial compared to big budget, mass media productions. And yet, in a relative sense, many smaller creators

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14. See ALAN B. KRUEGER, *ROCKONOMICS: A BACKSTAGE TOUR OF WHAT THE MUSIC INDUSTRY CAN TEACH US ABOUT ECONOMICS AND LIFE* 109–10 (2019); WILLIAM DERESIEWICZ, *THE DEATH OF THE ARTIST: HOW CREATORS ARE STRUGGLING TO SURVIVE IN THE AGE OF BILLIONAIRES AND BIG TECH* 21 (2020) (“Artists work on spec. You write a story, and then you hope that someone will pay you to publish it.”); cf. ISRAEL M. KIRZNER, *DISCOVERY AND THE CAPITALIST PROCESS* 108–09 (1985) (discussing the attractiveness to entrepreneurs of “unknown opportunities”).

15. See *infra* Section IV.D.2.

16. See *infra* Section III.A.

bear more risk than Big Media.<sup>17</sup> Even intrinsically motivated authors may incur substantial financial and human capital risk and opportunity costs. Chasing their passion, authors routinely sink large amounts of time (often months or years), effort, and capital into works they know are commercially risky.<sup>18</sup>

Of course, copyright and the entrepreneur's property right in the profits of their venture are not identical. The author's copyright is a state-sanctioned market intervention. It affords them the right to exclude limited forms of competition to remedy failure in the information goods markets that would, absent such remedy, cause underproduction of information goods. Other entrepreneurs take markets as they find them. This market intervention on authors' behalf engenders well-known costs not associated with entrepreneurs' property rights. First, copyright gives rise to allocative efficiency concerns.<sup>19</sup> In theory, the supramarginal pricing power copyright confers leads to monopoly pricing and consumer deadweight loss. Second, copyright's exclusive rights lead to a host of dynamic costs including restriction of speech, reduced access to information, and diminished follow-on production. From a social welfare perspective, copyright's exclusive rights are and should be limited to minimize these costs.

Nevertheless, the differences between authors and entrepreneurs—and between their respective entitlements—are overblown. The notion that authors and entrepreneurs differ because nonrivalrous information goods are not tied to exhaustible physical resources—thus copyright gives authors advantages of scale that producers of physical goods lack—is obsolete now that information digitization enables enterprises to reach “megascale” at near-zero marginal cost.<sup>20</sup> Concerns about allocative efficiency and monopoly

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17. Unlike Big Media, which spreads risk across a large portfolio of works increasing the chance of having a hit that covers losses from commercial failures, individual authors incur severe concentration risk because they can only bet on themselves. *See infra* note 140 and accompanying text.

18. *See* JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 89–91 (2014).

19. *See infra* Section VI.B.

20. *See* ALEX MOAZED & NICHOLAS L. JOHNSON, MODERN MONOPOLIES: WHAT IT TAKES TO DOMINATE THE 21ST CENTURY ECONOMY 72, 87 (2016); John Quiggen, *Intangibles=Monopoly*, JOHNQUIGGEN.COM (Aug. 3, 2020), <https://johnquiggin.com/2020/08/03/intangibles-monopoly/>; Adrienne LaFrance, *Facebook Is a Doomsday Machine*, ATLANTIC (Dec. 15, 2020), <https://www.theatlantic.com/technology/archive/2020/12/facebook-doomsday-machine/617384/>. Information monetization might have been relatively exclusive to media and publishing businesses in the twentieth century, but that is far from true today. Monetizing information is a preeminent business model among internet

pricing are also not fatal to the author-entrepreneur analogy because, although copyright affords limited exclusive rights, it does not create monopolies.<sup>21</sup> Further, the limited available empirical data on the pricing of certain copyrighted goods does not support the notion that monopoly pricing of information goods necessarily or even frequently materializes.<sup>22</sup> Finally, the dynamic costs engendered by copyright are real. However, the astounding volume of content being created and made readily accessible today raises doubts about whether copyright is unreasonably burdensome on a systemwide scale. This undermines the urgent calls to single out authorial “overcompensation” for efficiency’s sake.<sup>23</sup> To the extent copyright doctrines mitigate these dynamic costs, it is not through futile efforts to locate indeterminable authorial persuasion costs. Rather, copyright’s dynamic costs are mitigated by a robust set of limiting principles, rooted in foundational theory, which are compatible with an entrepreneurship theory-informed view of copyright.<sup>24</sup>

Because these differences are not fatal to the author-entrepreneur analogy, the analogy enables us to see authors as economic actors that transcend the silo of standard copyright theory. From this vantage point, the social costs of targeting authorial income are more apparent. As is argued in Section VII.C, for example, proposals to single out authors as a special class of economic actors whose income should be capped at their precise persuasion costs would perpetuate economic discrimination by limiting opportunities of entrepreneurs of color who are disproportionately well represented in the copyright industries.

There is additional mileage to be gained from the analogy. The author-as-entrepreneur framing illuminates that a central function of copyright is to provide a legal form analogous to the entrepreneur’s business entity: a form capable of being owned and securitized. Each authorial work is akin to a discrete venture.<sup>25</sup> Copyright provides a legal structure into which innovative

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technology companies. As the adage goes, when the information is free, the consumer is the product. The marginal cost for businesses such as Google, Facebook, and ByteDance to add an additional user is virtually zero, and because their businesses monetize nonrivalrous information, their scalability and profit potential is essentially limitless. *See infra* Section VI.A.

21. *See infra* Section VI.B.1.

22. *See infra* Section VI.B.2. There are exceptions, which I discuss in Sections III.C & VII.D.1.

23. *See infra* Section VI.C.

24. *See infra* notes 155–157 and accompanying text.

25. This observation is in tension with Julie Cohen’s correct observation that “[a]ny serious student of copyright law rapidly comes to realize . . . that as a practical matter

labor, together with capital and in-kind investments, may be invested to accumulate value.<sup>26</sup> Julie Cohen makes a similar observation in her groundbreaking essay, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*.<sup>27</sup> Cohen rejects the incentives-for-authors narrative and argues that copyright is akin to corporate property because it primarily functions as a modality for coordinating capital and creative industry stakeholders vis-à-vis creative works.<sup>28</sup> Cohen, however, overlooks the most compelling part of the analogy: the author stands in the role of entrepreneur. An entrepreneurship lens completes the analogy by recognizing the author as an entrepreneur who executes the core creative opportunity and marshals the resources and expertise necessary to commercialize the work.

Lastly, a word is in order about the terms “entrepreneur” and “author” and the overtones they carry. Some will inevitably feel that analogizing authors to entrepreneurs denigrates authors. Entrepreneurs have a history of being disparaged as unscrupulous profiteers,<sup>29</sup> although in recent decades they are more likely to be worshipped as captains of new industry and creative destroyers in the grandest Schumpeterian sense.<sup>30</sup> For William Deresiewicz, the term’s contemporary ebullience makes using it in connection with artists worse than denigrating: it’s “a scam.”<sup>31</sup>

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copyright’s project is increasingly that of setting parameters to govern access to and use of large numbers of works.” Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 153–54 (2011). The tension reflects the complexity of copyright and the many functions it plays. Intermediaries and aggregators are concerned with rules that impact the management and exploitation of large catalogs of works. For many authors, however, the individual work remains paramount.

26. See *infra* Section VII.A.

27. Cohen, *supra* note 25.

28. See *id.* at 141 (“In the contemporary information society, the purpose of copyright is to enable the provision of capital and organization so that creative work may be exploited. Copyright creates a foundation for predictability in the organization of cultural production, something particularly important in capital-intensive industries like film production, but important for many other industries as well.”).

29. See Angelo S. DeNisi & Benjamin N. Alexander, *The Dark Side of the Entrepreneurial Personality: Undesirable or Maladaptive Traits and Behaviors Associated with Entrepreneurs*, in THE WILEY HANDBOOK OF ENTREPRENEURSHIP 173, 182 (Gorkan Ahmetoglu, Tomas Chamorro-Premuzic, Bailey Klinger & Tessa Karcisky eds., 2017).

30. See Dick Meyer, *Too Much Hero Worship of Entrepreneurs*, SEATTLE TIMES (Sept. 7, 2015), <https://www.seattletimes.com/opinion/too-much-hero-worship-of-entrepreneurs/>; Alice Marwick, *Silicon Valley Isn’t a Meritocracy. And it’s Dangerous to Hero-Worship Entrepreneurs*, WIRED (Nov. 25, 2013), <https://www.wired.com/2013/11/silicon-valley-isnt-a-meritocracy-and-the-cult-of-the-entrepreneur-holds-people-back/>.

31. DERESIEWICZ, *supra* note 14, at 269.

[T]he word that's being urged on [artists] is "entrepreneur," as in "creative entrepreneur." It is a word whose prominence and resonance we owe to Silicon Valley, with its glamorized start-up culture, and that aligns the artist's interests with the interests of capital . . . . A self-employed artist—a self-employed anyone—is not an entrepreneur. They are simply a person without a job, living on their wits from check to check. "Entrepreneur" is a means of mystifying that condition, sugar for the turd of gig work.<sup>32</sup>

In this Article, "entrepreneur" does not have the burnished, *de rigueur* resonance that Deresiewicz conjures. Rather, consistent with the large body of multidisciplinary literature on entrepreneurship, it is used in a neutral sense to refer to an economic actor who bears risk and innovates to bring novel combinations to market.

I consciously define "author" somewhat broadly. It includes individual creators, both "superstar" creators as well as independent, workaday creators: the "prosaic"—rather than heroic—author, as Robert Merges puts it.<sup>33</sup> But for modern authors, commercial creative production can be a lengthy, complex, multi-stage process with many individuals and entities who add value along the creative "supply chain" employed to perfect a work into a viable commercial product. The old dividing lines between author and intermediary have blurred drastically. In some cases, the author performs functions traditionally handled by intermediaries.<sup>34</sup> In others the author and intermediary share functions that used to be reserved for one or the other.<sup>35</sup> My theory, aimed as it is at advancing a more realistic notion of commercial information production and incentives, fits across this range of actors.

The notion that authors are commercial actors should not repulse us.<sup>36</sup> The idea that art and commerce do not mix is a fantasy and always has been. As historian Susan Wise Bauer writes, "Great literature has never been independent of war, any more than it can shake itself free from commerce."<sup>37</sup> Unlocking the commercial value of art has profound positive effects including making art more accessible, disseminating knowledge, providing a livelihood for professional creators, developing domestic creative industry capacity, promoting democratic discourse, promoting distributive justice, and simply

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32. *Id.*

33. See ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 289 (2011).

34. DERESIEWICZ, *supra* note 14, at 70–75.

35. *Id.* at 71.

36. *Id.* at 24 ("Yes, art is part of the market economy, the cycle of investment and return. We need to stop being childish about this. We need to stop recoiling in horror at the mention, in connection with art, of the terms 'promotion,' 'cash flow,' 'business model,' 'lawyer.'").

37. SUSAN WISE BAUER, HISTORY OF THE ANCIENT WORLD 48 (2007).

enriching peoples' lives through entertainment.<sup>38</sup> Ultimately, authors who commercialize their works are commercial actors—they are entrepreneurs. Copyright theory needs a more realistic account of them.

This Article proceeds as follows. Part II outlines the standard utilitarian rationale that predominates copyright theory, discusses the growing chorus of voices criticizing it, and argues that its usual formulation is too narrow to capture copyright's real incentivization function. Part III articulates the heart of the entrepreneurship theory of copyright: that entrepreneurs' profit entitlements arise from their risk bearing and innovation, irrespective of intrinsic or extrinsic motivations. It discusses the similar functions between entrepreneurial profit incentives and copyright incentives and shows how entrepreneurship theory can inform copyright theory. Part IV reviews multidisciplinary entrepreneurship literature to locate a definition of "entrepreneur." It identifies the key entrepreneurial characteristics as risk bearing in the face of market uncertainty, combined with innovation and commercialization. Part V makes the case that authors—including both independent and corporate authors—fit comfortably within the definition of "entrepreneur." Part VI addresses the primary objections to comparing authors and entrepreneurs: that copyright is state intervention in free markets for information goods that leads to unique static and dynamic costs. It shows why the differences wrought by copyright's market intervention scheme are not fatal to the analogy between authors and entrepreneurs. Part VII develops additional implications for copyright theory when authors are understood to be entrepreneurs. First, it argues that copyright functions similarly to a business entity as a vehicle for securitization and stakeholder coordination. Second, it looks at how entrepreneurship theory intersects with nonconsequentialist theories of copyright. Third, it considers distributive justice aspects of copyright that entrepreneurship theory helps to illuminate. And lastly, it proposes some doctrinal implications for the entrepreneurship theory of copyright.

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38. See generally TYLER COWAN, IN PRAISE OF COMMERCIAL CULTURE (1998); Sean A. Pager, *Beyond Commerce versus Culture: Decentralizing Cultural Protection to Promote Diversity Through Trade*, 31 NW. J. INT'L L. & BUS. 63 (2011); see also NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 88–89 (2008) (arguing that in addition to copyright's "production function" that induces a healthy quantity of creative expression, it has a "structural function" that underwrites freedom of expression by "support[ing] a market-based sector of authors and publishers, those who look to paying audiences (and advertisers)," rather than government subsidies or elite patronage, for financial sustenance); Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513, 576 (2016) ("[F]rom the limited evidence available, the copyright system appears to contribute positively and significantly to economic distributive justice in the U.S. economy.").

## II. UTILITARIAN THEORY AND ITS DISCONTENTS

Copyright scholars are universally familiar with utilitarian theory's incentive-access paradigm that predominates copyright theory in the United States. Affording exclusive rights in works of original expression incentivizes their production by ensuring authors an opportunity to recoup the costs of creation. In return for the grant of exclusive rights that limit access, but also limit free-riding, society gains the benefit of enjoying works that but for this scheme might never be produced.<sup>39</sup> Utilitarian theory's influence on U.S. copyright law is hard to overstate. It is widely regarded as the most important—if not the only meaningful—justification for copyright in the United States.<sup>40</sup> Many interpret the “Progress Clause” of the Constitution in strict utilitarian terms.<sup>41</sup>

The utilitarian rationale has become so central to copyright theory that for many copyright scholars today it is reductionist: it is the sole rationale for copyright and guides all of its normative parameters.<sup>42</sup> Jessica Litman observes that, in recent decades, copyright maximalists, influenced by law and

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39. See William M. Landes & Richard Posner, *An Economic Analysis of Copyright*, 18 J. LEGAL STUD. 325, 326 (1989).

40. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994); *Golan v. Holder*, 565 U.S. 302, 345 (2012) (Breyer, J., dissenting); William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 170 (Stephen R. Munzer ed. 2001) (noting utilitarianism is the most influential theory of intellectual property in the United States); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and “Work-Makes-Work,” Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2093 (2011) (“[I]ncentivizing the ‘progress of science and the useful arts’ has been the putative goal of intellectual property law [] since the United States’ constitutional beginnings.”); Mark Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2015) (largely rejecting non-utilitarian rationales for IP); Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 269 (2006) (“Unlike its cousins property law and the First Amendment, which bear the weight of values such as autonomy, culture, equality, and democracy, in the United States intellectual property is understood almost exclusively as being about incentives. To put it bluntly, there are no ‘giant-sized’ intellectual property values.”); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 J. GENDER, SOC. POL’Y, & L. 365, 370 (2010); Brian L. Frye, *Copyright as Charity*, 39 NOVA L. REV. 343, 351–52 (2015).

41. U.S. CONST. art. I, § 8, cl. 8. The clause states that Congress shall have the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.* For a discussion of the Progress Clause and utilitarianism, see Fromer, *supra* note 4, at 1750–52.

42. See Michal Shur-Ofry, *IP and the Lens of Complexity*, 54 IDEA 55, 94 (2013); Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 ST. JOHN’S L. REV. 681 (2016) (outlining problems with utilitarian reductionism).

economics thinking, promoted an extreme utilitarian interpretation to suit their policy objectives.<sup>43</sup> If copyright is necessary to incentivize production, the theory goes, the stronger the copyright regime, the more works will be produced and the more society will benefit.<sup>44</sup> But the theory appeals to copyright skeptics as well. Although its internal logic might lead one to conclude the theory justifies a perpetual one-way ratchet of protection,<sup>45</sup> it is also empirically testable, has an inherent limiting principle, and is readily falsifiable.<sup>46</sup> If the theory proves false, then the whole of copyright rests on dubious theoretical grounds.<sup>47</sup>

Thus, the fact that utilitarian incentive theory is simultaneously copyright's foundational theory and an "easy mark" has made it a favorite target of copyright skeptics.<sup>48</sup> The fashionable critique of utilitarian incentive theory is that pecuniary incentives are not the only—and often not even the dominant—motivation for the creation of expressive works. Per this critique, if people create for intrinsic reasons, copyright's incentive justification crumbles. Tested under real-world conditions, the incentive theory becomes a straw man, easily bludgeoned by empirical inquiry and common experience. For example, in her book *The Eureka Myth*, Jessica Silbey interviews a number of creators to ascertain to what extent copyright incentivizes "the beginnings of creative or inventive experience."<sup>49</sup> Unsurprisingly, creators cited intrinsic motivations as being far more important than abstract notions of intellectual property when it comes to priming their creative juices.<sup>50</sup> This leads Silbey to conclude that the insight that copyright "does not necessarily incentivize creativity . . . should undermine the frequent assertions that producing intellectual goods requires the set of robust external incentives that our IP regimes provide."<sup>51</sup> Many other scholars similarly suggest that if human beings

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43. JESSICA LITMAN, DIGITAL COPYRIGHT 79 (2001).

44. *Id.* at 80.

45. *See id.*

46. *See* Frye, *supra* note 40, at 351–52.

47. *See* Shyamkrishna Balganesh, *The Immanent Rationality of Copyright Law*, 115 MICH. L. REV. 1047, 1049 (2017); MERGES, *supra* note 33, at 246.

48. *See* Justin Hughes, *Copyright and Its Rewards, Foreseen and Unforeseen*, 122 HARV. L. REV. 81, 83–84 (2009) (“[A]lmost all the intellectual property literature about incentives is about expanding or curtailing the exclusionary entitlements. In response to the real-world expansion of copyright, the academic literature has—for years, if not decades—been almost exclusively about ways to curtail the copyright entitlements.”).

49. SILBEY, *supra* note 18, at 53.

50. *See id.*

51. *Id.* at 276–77.

frequently create for intrinsic reasons, copyright stands on shaky theoretical foundations.<sup>52</sup>

The idea that intrinsic motivations undermine the need for copyright rests on an unjustifiably stingy notion of copyright incentives. For many copyright scholars, “incentive” narrowly refers to the precise amount of money necessary to motivate an author to create a work.<sup>53</sup> But the notion that copyright incentivizes a discrete act of creation mischaracterizes how copyright incentives work. Creators may have intrinsic, nonpecuniary motivations to create but nevertheless bear substantial commercial risk; it is that risk bearing that copyright incentivizes. Creators’ intrinsic motivations tell us nothing about whether a quality consumable information good will ever make its way to the public.<sup>54</sup> If bringing the work to market involves more commercial risk than the creator or their intermediaries can tolerate, the work simply will not make it to consumers regardless of an author’s intrinsic or extrinsic motivations.<sup>55</sup> As is detailed below, a more realistic and theoretically robust account of copyright recognizes that copyright incentivizes innovation and commercial risk bearing: specifically, the bearing of commercial risk entailed in shepherding a work from conception to a realized, marketable information good.<sup>56</sup>

When copyright skeptics acknowledge that high-investment works like blockbuster movies will not be made without a copyright system, they do not reference intrinsic or extrinsic motivations of creators—they tacitly acknowledge the reality that copyright is there to incentivize commercial risk bearing.<sup>57</sup> But those who acknowledge the importance of copyright for high-

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52. See, e.g., Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 627 (2012); LITMAN, *supra* note 43, at 102–05; Diane Leenheer Zimmerman, *Copyright as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES LAW 29, 31 (2011); Rebecca Tushnet, *Economics of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009); Felix Oberholzer-Gee & Koleman Strumpf, *File Sharing and Copyright*, 10 INNOVATION POL’Y & ECON. 19, 23, 49–50 (2010); YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 308 (2002); cf. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012) (arguing that the fact that human creativity often thrives in the absence of intellectual property incentives undermines the “monopoly theory” of IP).

53. See *supra* note 11 and accompanying text.

54. See Ted Sichelman, *Taking Commercialisation Seriously*, 33 EUR. INTELL. PROP. REV. 200, 201–02 (2011).

55. *Id.* at 201.

56. See *infra* Section III.B.

57. See, e.g., LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 291 (2008) (“[T]he sharing economy notwithstanding, there’s lots that

budget works often in the next breath segregate “small” creators from big-budget cultural industries. For example, after noting the importance of copyright for big-budget films, Kal Raustiala and Christopher Sprigman maintain that “[o]ther industries are quite inexpensive.” They observe, for example, that “[m]usicians often say that a lyric or chord popped in their mind in a flash, a few hours later they had a full-fledged song.”<sup>58</sup> Lawrence Lessig similarly argues that copyright is really only relevant to “Hollywood films, some kinds of blockbuster movies, maybe Justin Timberlake-like music, and maybe a few types of books.”<sup>59</sup> In short, the received wisdom about copyright is that it does not incentivize the act of creation (because many people create for intrinsic reasons) and, at best, it incentivizes commercial investment in a few big-budget, mass-market entertainment works.

But these views overlook the entrepreneurial nature of professional creation on a spectrum of economic levels, producing an enormous blind spot in copyright incentive theory. In that blind spot are millions of professional creators who are not Big Media but who routinely bear commercial risks to follow their passions and produce valuable works. The standard view of copyright as a creativity-incentivizer doubts whether small and independent creators deserve a copyright at all given that they often are driven at least partly by intrinsic motivations. The copyright-as-blockbuster-incentive view doubts independent creators’ need for copyright because their economic investments are small compared to Hollywood blockbusters. But creators across the spectrum can and do bear commercial risk—often enormous risk.<sup>60</sup> Indie creators often bear more risk, relatively speaking, than do major producers.<sup>61</sup> Raustiala and Sprigman understate the risk, for example, of the composer who writes a song “in a flash.” Writing the song is just step one in the process of making a work consumable and commercially viable. There are substantial costs involved in obtaining recording equipment and hiring producers, engineers, and other professionals who can transform the song into a high-

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won’t be created without an effective copyright regime too. I love terrible Hollywood blockbusters. If anyone could copy in high quality a Hollywood film the moment it was released, no one could afford to make \$100 million blockbusters.”) [hereinafter LESSIG, REMIX]; RAUSTIALA & SPRIGMAN, *supra* note 52, at 150, 171 (doubting the “monopoly theory of IP,” which “says that easy and legal copying destroys the incentive to create,” but also acknowledging that industries such as Hollywood, with high upfront costs, are harmed by copying).

58. RAUSTIALA & SPRIGMAN, *supra* note 52, at 171.

59. LESSIG, REMIX, *supra* note 57, at 292.

60. See DERESIEWICZ, *supra* note 14, at 3–6, 68–85.

61. See *infra* notes 138–140 and accompanying text.

quality recording.<sup>62</sup> These activities all involve sunk costs. They all involve commercial risk. All these activities, as argued in this Article, are entrepreneurial and justify copyright regardless of intrinsic motivations.

The reductionist utilitarian view of incentives also translates poorly to real-world copyright doctrine, despite utilitarianism's conceptual and rhetorical dominance. "[I]n spite of [copyright's] avowed adherence to [the utilitarian] theory of incentives," Shyamkrishna Balganesh observes, "its internal doctrinal devices do little to give effect to its theoretical basis . . . . [I]n interpreting and developing different formulations of copyright's doctrinal devices, courts rarely, if ever, make reference to incentives."<sup>63</sup> There is a straightforward explanation for this: a "perfect instrumentalist copyright law," as Justin Hughes puts it, is simply unworkable because "broad categories of what incentive is needed for what kinds of works will never be accurate and will be constantly in need in revision."<sup>64</sup> It is a fool's errand to attempt to calculate everyone's persuasion costs *ex ante*. Given the indeterminacy of the very thing around which its incentive theory is structured, utilitarianism provides little useful guidance for copyright policy beyond the most general prescriptions.<sup>65</sup>

Moreover, even if persuasion costs were somehow calculable, one must properly identify what conduct is to be induced from whom. As discussed in Section III.B, authors frequently require the help of others to produce commercially viable information goods. A theory that purports to efficiently incentivize some imagined initial creative act grossly underestimates the range of commercial investment and risk bearing involved in actually bringing a viable, high-quality information product to market. Incentive effects also operate well beyond the individual creator. Outsized rewards earned by one

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62. See Jonathan M. Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389, 415–16 (2014); DERESIEWICZ, *supra* note 14, at 22 (citing interviews with musicians who maintain that recording an album "in any serious way" typically costs about \$20,000, including the costs of studio time and personnel, session players, and mastering).

63. Balganesh, *supra* note 11, at 1577.

64. Hughes, *supra* note 48, at 94.

65. See Shur-Ofry, *supra* note 42, at 100 (arguing that incentives and rewards "matter in a rough and inherently inaccurate manner," but it may be impossible to design IP norms that are proportional to authorial investment because IP laws operate in complex social and economic systems that attenuate linear connections between scope of rights and incentives); Merges, *supra* note 42, at 697–700 (discussing the "calculability critique" of utilitarianism, which argues that determining the net consequences of most simple actions is extremely difficult, making it hopeless to determine the net welfare effects of complex actions that occur within a lattice of further complex business and social interactions).

creator motivate other creators who dream of reaping similar rewards.<sup>66</sup> A reductionist utilitarian view of incentives does not, and simply cannot, calculate this complex lattice of incentives.

In sum, despite its dominance, the utilitarian copyright incentive narrative is impoverished descriptively and prescriptively. As the next Part argues, entrepreneurship theory—with its focus on incentivizing commercial risk-bearing and innovation—provides a richer theoretical framework for understanding copyright’s incentive function.

### III. A THEORY OF COPYRIGHT INCENTIVES INFORMED BY ENTREPRENEURSHIP THEORY

#### A. PROPERTY AS COMPENSATION FOR ENTREPRENEURIAL RISK BEARING AND INNOVATION

Copyright theory offers surprisingly little theorizing about the nature of copyright income. As noted, utilitarian theorists often employ a narrow conception of copyright incentives that would minimize deadweight loss by capping an author’s earnings at precise persuasion costs. Such a theory is futile as a policy guide<sup>67</sup> and rests on an impoverished conception of how incentives work in real-world creative processes involving substantial risk bearing, investment, and commercialization.<sup>68</sup> Like copyright income, entrepreneurial profit is speculative, property-derived income. Accordingly, examining the nature of entrepreneurial profit can help inform copyright theory regarding how copyright income functions as an incentive to create.

##### 1. *The Nature of Entrepreneurial Profits: Incentive and Reward for Risk Bearing in the Face of Market Uncertainty*

For their efforts, entrepreneurs have claim to two *intangible* property rights in addition to the property rights they receive in the rivalrous goods or services they produce. First, they receive an ownership right in their venture. Second, and relatedly, they have the right to any profits their venture generates.<sup>69</sup>

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66. See F.M. Scherer, *The Innovation Lottery*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 5, 5 (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., 2001).

67. See *supra* notes 63–66 and accompanying text.

68. See Barnett, *supra* note 62, at 391; Sichelman, *supra* note 54, at 201–02.

69. Whether the “right” to profit that an entrepreneur receives is an affirmatively granted property right or merely a negative liberty our capitalist system permits is academic. In our legal system, the entrepreneur’s claim to the profits of their venture is a recognized property right that is incontrovertible. See, e.g., GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS

In his study on the origin of profits, Mark Obrinsky concludes that property ownership is essential to explaining the nature of entrepreneurial profits.<sup>70</sup> He highlights the critical distinction between labor-derived income and property-derived income.<sup>71</sup> Entrepreneurial profit is not a predetermined salary nor is it a fixed wage for labor performed. Entrepreneurial profit is whatever surplus remains after deducting costs related to production.<sup>72</sup> The entrepreneur's intangible property right in that surplus itself arises from property ownership—that is, private ownership of the productive resources that generated the surplus.<sup>73</sup>

Why, according to this theory, should the entrepreneur have the exclusive right to the surplus and not be expected to share it with employees who also participate in the venture? The answer comes down to the role of uncertainty and risk: the entrepreneur bears the risk of failure in a way that salaried employees do not.<sup>74</sup> If the business fails, the employees, through contractual income, have been made whole nonetheless for their efforts while the entrepreneur has not.

The risk that the entrepreneur bears because of uncertainty has long been cited as a primary justification for the entrepreneur's right to the resulting profits.<sup>75</sup> Richard Cantillon, the eighteenth-century French-Irish economist who was the first to discuss at length the entrepreneur's economic function, saw risk bearing as key to the entrepreneurial profit entitlement, noting that without profit there would be little reason for entrepreneurs to bear the risk of speculative economic activity.<sup>76</sup> Nineteenth-century economist J.H. von Thünen observes that the entrepreneur's profit is a reward for innovation and compensation for the opportunity costs incurred by forgoing stabler, less risky

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§ 53:61 (2021) (noting that a partner's default "right to profits" of a partnership "is in the nature of an intangible interest existing only in connection with the assets or value of the partnership, without any regard to the physical character of the partnership property" and "[u]nder the UPA, a partner's interest in the partnership is his or her share of the profits and is considered personal property").

70. See MARK OBRINSKY, *PROFIT THEORY AND CAPITALISM* 153 (1983).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 165; Theodore W. Schultz, *Investment in Entrepreneurial Ability*, 82 SCANDINAVIAN J. ECON. 437, 443 (1980).

75. See Emeric Solymossy & John K. Masters, *Ethics through an Entrepreneurial Lens: Theory and Observation*, 38 J. BUS. ETHICS 227, 233 (2002) ("Risk tolerance in consideration for economic profit is a consistent element in all early theories of entrepreneurship.").

76. ROBERT F. HÉBERT & ALBERT N. LINK, *HISTORICAL PERSPECTIVES ON THE ENTREPRENEUR* 19–22 (2006).

careers.<sup>77</sup> As Albert Link and Donald Siegel note, “Thünen was quite explicit about the fact that there are two elements in entrepreneurial income: a return to entrepreneurial risk and a return to ingenuity.”<sup>78</sup> Chicago-School economist Frank Knight similarly argues that profit arises from market uncertainty and incentivizes entrepreneurs to fulfill the critical role of bearer of market uncertainty.<sup>79</sup> Joseph Schumpeter, arguably the most influential economist in the field of entrepreneurship studies,<sup>80</sup> also sees profit as a key incentive for entrepreneurial activity,<sup>81</sup> observing that, “Without development there is no profit, without profit no development.”<sup>82</sup> (As is noted below, Schumpeter also recognizes the importance of non-pecuniary motivations.)<sup>83</sup> Nikolaas Pierson posits that profit is the “remuneration” the entrepreneur receives for their

77. *Id.* at 54 (discussing Thünen’s conception of entrepreneurial profit in the second volume of *The Isolated State* (1850)).

78. ALBERT N. LINK & DONALD S. SIEGEL, *INNOVATION, ENTREPRENEURSHIP, AND TECHNOLOGICAL CHANGE* 20 (2007).

79. HÉBERT & LINK, *supra* note 76, at 89–90 (2006).

80. *See infra* note 191 and accompanying text.

81. *See* JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE* 137, 155 (Redvers Opie trans., 1949) (1934) [hereinafter SCHUMPETER, *THEORY OF ECONOMIC DEVELOPMENT*]; JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM & DEMOCRACY* 73–74 (Routledge 2003) (1943) [hereinafter SCHUMPETER, *CAPITALISM*]. Schumpeter is notable among entrepreneurship theorists for denying that the entrepreneur bears risk, thereby distinguishing the entrepreneur’s economic role from that of the capitalist. *See* HÉBERT & LINK, *supra* note 76, at 102–03. Nevertheless, it is difficult to interpret Schumpeter as referring to anything but entrepreneurial risk when he writes that the discrepancy between profit size and necessary incentive “explains why the entrepreneur can be relatively so easily deprived of his profit and why the [salaried manager] . . . can generally be adequately remunerated with much less than the full amount of the profit.” SCHUMPETER, *THEORY OF ECONOMIC DEVELOPMENT*, *supra*, at 155.

82. SCHUMPETER, *THEORY OF ECONOMIC DEVELOPMENT*, *supra* note 81, at 154. Kirzner similarly observes that without commensurately attractive rewards, the risks outweigh the benefits of engaging in socially and economically desirable entrepreneurial activity. *See* ISRAEL M. KIRZNER, *THE DRIVING FORCE OF THE MARKET: ESSAYS IN AUSTRIAN ECONOMICS* 110 (2000) (citing the profit theory of F.B. Hawley and noting that, “[w]ere no one prepared to assume . . . industrial risk, it would not be possible for production to occur. Profit provides a reward for this entrepreneurially provided service, and thus also an inducement persuading the entrepreneur to provide this service”). Leyden and Link offer a more nuanced view of monetary entrepreneurial incentives: “While profits are clearly part of what motivates the entrepreneur, we assume that the motivation of the entrepreneur is better modeled as seeking to maximize the likelihood of success than simply to maximize profits.” Leyden & Link, *supra* note 10, at 478.

83. *See infra* note 215 and accompanying text.

judgment, effort, and the anxiety produced by risk bearing.<sup>84</sup> Nobel laureate T.W. Schultz similarly views profit as a reward for economic value generated by the entrepreneur's risk bearing: "Every entrepreneurial decision to reallocate resources entails risk. What entrepreneurs do has an economic value. This value accrues to them as a rent, i.e., a rent which is a reward for their entrepreneurial performance. This reward is *earned*."<sup>85</sup> Obrinsky disagrees with the view that profit may be strictly explained as a reward for risk bearing because "not all those who face uncertainty are rewarded positively; thus uncertainty would have to be viewed as the source of both profits and losses."<sup>86</sup> This tension is resolved, however, by understanding that the incentive and reward for risk bearing is the *right* to profit income, regardless of whether profit actually materializes.

2. *Applying Lessons from Entrepreneurial Profit Theory to Copyright Income: Incentivizing Risk Bearing and Innovation*

In entrepreneurship theory, a property right in venture profits is the result of the entrepreneur's risk bearing and innovation. Profit may serve as an incentive, but it is the risk bearing and innovation that triggers the entitlement.

Copyright similarly affords authors the right to the income from their "ventures." Like entrepreneurs, authors receive a property right in the profits that arise from their speculative investments. Like entrepreneurial profit, copyright income stems from property ownership—in this case, the copyright is an intangible asset. And like profit, copyright income is indeterminate at the outset and varies depending on the work's market reception. In this light, the copyright is legitimate authorial compensation for (1) bearing the risks associated with market uncertainty and forgoing more stable and predictable income, and (2) innovating, as the legal right emanates from original matter

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84. NIKOLAAS G. PIERSON, PRINCIPLES OF ECONOMICS, VOL. I. 236 (1902). Pierson, like many economists, struggles to determine the nature of profit. He therefore classifies it as a "wage" earned for the entrepreneur's "labor." See OBRINSKY, *supra* note 70, at 56. The analogy between profit and wages does not fare well upon close examination, however. In the view of many economists discussed above, profit is property-generated income that arises from the entrepreneur's unique contributions to the economy—bearing the economic risk of market uncertainty, organizing the means of production, and innovating—which are not quintessential functions of wage-earners. As Obrinsky points out, moreover, it is a "peculiar sort of wage" that can never be stipulated in advance and is paid only if and to the extent that there is surplus over interest, rent, and other wages. OBRINSKY, *supra* note 70, at 56–57. Further, why should the entrepreneur alone be entitled to "wages" from the surplus, and why should such wages continue to accrue to the business owner who has handed operational duties to others? *Id.* Schumpeter similarly dismisses the idea that profit is a form of wage. See SCHUMPETER, THEORY OF ECONOMIC DEVELOPMENT, *supra* note 81, at 153.

85. Schultz, *supra* note 74, at 443.

86. OBRINSKY, *supra* note 70, at 165.

the author adds to the work. Paraphrasing Schultz's formulation, the right to copyright income is "earned" in exchange for the economic value the author adds by the risk-laden reallocation of resources toward the authorial endeavor.<sup>87</sup>

The crux of the analogy is that both the author and entrepreneur speculate by investing in an intangible—a work or a venture—that will generate value. In lieu of salary, both are afforded a property right as compensation for their efforts that they expect to generate long-term returns and afford "a reasonable chance of enjoying a worthwhile portion of the return."<sup>88</sup> As Jon Garon argues, copyright's theory of authorial incentives should include the incentive to forgo predictable income streams to incur the risk and opportunity costs inherent in authorship.<sup>89</sup>

Understanding authors as entrepreneurs enhances copyright theory in several ways. First, there is value in simply clarifying that commercial risk bearing and innovation—rather than a mythical authorial creative spark—are the aim of copyright incentivizes. The "incentivizes authorial creation" standard is bound to underestimate real-world incentives. It only considers authorial *persuasion costs*. Authorial persuasion costs are *not* the same as risk bearing. Because many authors respond to intrinsic motivations, the persuasion cost for many authors is zero—or at least much lower than the risk they incur and the value they add through innovation.<sup>90</sup> Underestimating incentives and risk bearing inevitably engenders proposals that advocate significant over-tailoring.<sup>91</sup> Such proposals impose their own social costs and are out of touch with the commercial realities of creators and the creative industry ecosystem. We need not search for mysterious motivations or weave stories about the precise level of financial incentive needed to tip the scales for the wealth-maximizing author torn between whether to write a novel or wait tables today. The act of authorship entails commercial risk and innovation—that is sufficient to justify the right.

Second, an entrepreneurship view of copyright comfortably accommodates intermediary incentives. Intellectual property scholars have struggled with the extent to which copyright theory should include

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87. See *supra* note 85 and accompanying text.

88. JONATHAN HASKEL & STIAN WESTLAKE, CAPITALISM WITHOUT CAPITAL: THE RISE OF THE INTANGIBLE ECONOMY 49 (2017).

89. Jon Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy & Ethics*, 88 CORNELL L. REV. 1278, 1313–14 (2003).

90. See *supra* notes 49–52 and accompanying text.

91. See *infra* notes 101–114 and accompanying text and *infra* Part VII.C for discussions of proposals that would over-tailor rights and would have demonstrable negative effects on authors and creative ecosystems.

intermediary incentives because intermediaries are largely absent from the standard authorial incentive narrative. Accordingly, some commentators seemingly view authors and intermediaries as a unit for commercial incentive purposes—but only for big-budget works.<sup>92</sup> For smaller-budget works, these commentators presumably view authors as responding to intrinsic motivations while intermediaries are mere rent-seekers in the era of “easy” digital distribution. Other commentators see a strict dichotomy between authorial and intermediary incentives—the former justifying copyright and the latter not.<sup>93</sup> Others have suggested that incentivizing intermediaries alone is the purpose of, or at least sufficient justification for, copyright.<sup>94</sup> All of these views create an unnecessary dichotomy between authorial and intermediary incentives. Copyright ensures high-quality works are produced, perfected, and disseminated.<sup>95</sup> The major barrier to entry for authors and their channel partners is commercial risk, just as the major barrier to entrepreneurial activity is commercial risk. We need not separate the incentives of authors and commercial intermediaries; all generally bear some level of commercial risk, and, for all, property rights are important incentives for risk bearing. Copyright in practice incentivizes a range of actors just as the profit interest incentivizes entrepreneurs in addition to investors and commercial partners. The simple point is that society benefits when people venture out of their safe zones and are helped by those in a position to help, so the law is structured to incentivize that range of activity. The role of copyright in incentivizing intermediaries is elaborated in Section III.B, below.

Third, the risk-oriented entrepreneurship framing illuminates how proposals that would “efficiently” cap authorial income undermine the purpose of economic speculation through investing sunk costs into intangible assets. People generally do not engage in risk bearing and economic speculation with the aim of merely recouping their investment.<sup>96</sup> As Diane Coyle puts it, “People who take bigger risks, whether financial speculators or

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92. See *supra* notes 57–59 and accompanying text.

93. See, e.g., Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 138 (2004) (“We need to give creators of . . . copyrighted works power over price because the act of creation imposes a cost that imitators do not share. There is no similar cost imbalance when it comes to the distribution of a work that has already been created.”); Oren Bracha, *Give Us Back Our Tragedy*, 19 THEORETICAL INQUIRIES LAW 633, 658–61 (2018) (arguing that commercialization really involves “the production of two related information goods—a primary innovation and secondary commercialization information,” and whatever incentives might be necessary to produce the “secondary” information good “ha[ve] nothing to do with allocation and use of the primary innovation”).

94. See Barnett, *supra* note 62, at 389.

95. *Id.* at 405–06.

96. See Sichelman, *supra* note 54, at 201.

business entrepreneurs, tend to earn higher rewards on average. If they didn't expect to do so, there'd be no point in taking the risk. They might as well opt for a quieter life."<sup>97</sup> The whole point of investing in intangible assets—whether a business or creative work—is that the investor expects it to produce substantial benefits over the long term, well after the investment is completed.<sup>98</sup> True, copyright permits authors to enjoy scale advantages that entrepreneurs of physical goods or services do not, especially in the digital age since physical production is limited by resource constraints while digital information goods are reproduced at zero marginal cost and are therefore infinitely scalable.<sup>99</sup> This is a feature of copyright, not a bug. The right's scalability is what makes it attractive. The scalability and opportunity for outsized rewards helps counterbalance the major risk, due to uncertainty, of the sunken-ness of investment in intangibles. An entrepreneur who invests in tangible assets and produces physical goods can liquidate the assets and unsold inventory to recoup a portion of their costs. By contrast, there is little salvage value in a screenplay no one wants. Because of these risks, investments in intangible assets are much harder to finance, further increasing the author-entrepreneur's risk exposure and reinforcing the need for a shot at disproportionately higher rewards.<sup>100</sup>

Fourth, an entrepreneurial view of copyright spotlights the critical role uncertainty plays in markets for information works and therefore on incentives across the range of actors whom copyright incentivizes. Authors and their intermediaries face uncertainty on two levels, both of which increase risk. On one level, as is detailed in Section V.A, they face significant uncertainty regarding the market reception for a given work. On another level, they face uncertainty regarding what markets will even exist for their works as technologies and consumption habits change. If we think of copyright as merely incentivizing the creation of a work, uncertainty about future markets for that work seems like an opportune place to cut off copyright entitlements. After all, if an author could not foresee a new market, that author could not have been incentivized *ex ante* to create a work with hopes of monetizing that market. Professor Balganesch has thus argued that copyright should be limited to uses that were foreseeable by the creator at the time of creation.<sup>101</sup> On this view, the author could not partake in income from some new distribution

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97. DIANE COYLE, *SEX, DRUGS, & ECONOMICS: AN UNCONVENTIONAL INTRODUCTION TO ECONOMICS* 225 (2004).

98. See HASKEL & WESTLAKE, *supra* note 88, at 67.

99. Cf. LUNNEY, *supra* note 3, at 198 n.6.

100. See HASKEL & WESTLAKE, *supra* note 88, at 61.

101. Balganesch, *supra* note 11, at 1574–75.

paradigms if they were unforeseen at the time of creation.<sup>102</sup> Justin Hughes, in response, raises the obvious practical problems with such a proposal—how would one define an unforeseeable use?—and raises the critique that dogs all proposals to implement a copyright system tailored to authors’ persuasion costs: it is hopelessly complex and costly to determine authorial incentives *ex ante*.<sup>103</sup>

But an entrepreneurship lens illuminates a theoretical shortcoming of the idea of limiting authorial income to foreseeable markets: if copyright incentivizes *risk bearing* (rather than the act of creation), the uncertainty around foreseeability of markets justifies *extending* rights into unforeseen markets, not curtailing them. The idea of limiting one’s market to that which one envisioned at the moment a venture was conceived is antithetical to entrepreneurship. Start-up ventures often do not end up serving the customers or markets that they envisioned when they started.<sup>104</sup> This dynamic is so well understood by entrepreneurs that “pivot or die” is a mantra within the start-up community.<sup>105</sup> Market uncertainty is inherent in entrepreneurial speculation and baked into entrepreneurial and authorial incentives.<sup>106</sup> Entrepreneurs invest in their businesses fully recognizing that profits may lie only in unforeseen markets.<sup>107</sup> Authors and their intermediaries likewise invest speculatively in works they hope will generate value. How and in what form the works generate value is determined by the market. The peculiar future distribution platforms or

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102. *Id.* at 1603–09.

103. Hughes, *supra* note 48; *see also* Merges, *supra* note 42, at 697–700 (noting the “incalculability critique” of utilitarianism).

104. *See* Monique Boddington & Stelios Kavadias, How to Pivot or Persevere? Unpacking the Role of Reasoning Models in Entrepreneurial Strategy Formation 1–2 (Feb. 1, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3842498](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3842498).

105. *See, e.g.*, Thomas Koulopoulos, *Why the One Thing You Fight Against the Most May Be the Secret to Your Success*, INC. (Nov. 13, 2017), <https://www.inc.com/thomas-koulopoulos/pivot-or-die-why-most-important-lesson-about-success-is-not-holding-on-but-letting-go.html>.

106. Professor Balganesch addresses this issue with a head-scratching argument about why authors’ “open-ended expectations” concerning the right to monetize unforeseen markets should not be counted as *ex ante* incentives. Authors’ open-ended expectations concerning new markets should not be given effect, he maintains, so long as the author would create the work despite the author’s uncertainty about whether their open-ended expectations about new markets would be given effect. *See* Balganesch, *supra* note 11, at 1619–21. The law should therefore keep authors in a state of perpetual uncertainty—and induce them to create in blissful ignorance of foreclosed future markets—by “structuring the foreseeability test as a fuzzy standard.” *Id.* at 1621. Aside from the logical and normative problems with this argument, it—like most arguments founded in a narrow conception of authorial incentives—misconceives how copyright incentives actually work and how they interplay with uncertainty and risk. *See* Hughes, *supra* note 48, at 92–96.

107. *See* Knowledge@Wharton, *When and How Entrepreneurs Pivot*, June 11, 2019 (interviewing professor of management Jacqueline Kirtley).

consumption habits *du jour* from which value and profit will derive are irrelevant to the author and intermediary's decision to bear risk.<sup>108</sup>

My previous research on China's music industry provides an instructive example of why copyright's ability to "pivot" with new revenue generation models is important to copyright owners.<sup>109</sup> A songwriter or record label investing in music production in China in the 1990s would be aware only of physical media as a primary monetization and distribution model. By the 2000s, that market was eviscerated by digital piracy, requiring producers to switch to an entirely new monetization model: mobile phone ring-back tones, which are "hold music" a subscriber chooses for callers to listen to as they await the subscriber's answer.<sup>110</sup> By 2011, ring-back tones generated \$4 billion a year in China and were by far the dominant revenue stream.<sup>111</sup> But ring-back tones became passé and in a few short years yielded to streaming as the new dominant model, which today is losing market share to TikTok-style short-form video apps and online karaoke apps such as WeSing.<sup>112</sup> Under Professor Balganesch's proposal, each of these uses is arguably "unforeseeable" to creators operating under a previous monetization paradigm.<sup>113</sup> At each of these stages, authors bore the risk of producing works they expected to generate value. Shortly after production, however, the work generated value through an unforeseen use. This kind of uncertainty around how the work ultimately generates value is part of the uncertainty inherent in the entrepreneurial risk that justifies the property right.

My research on China shows that copyright's ability to enable copyright owners to tap into new markets as they develop is critical to their economic expectations and well-being.<sup>114</sup> Moreover, when copyright owners are unable to capture value from new technological platforms on which their works generate value, the operator of the new platform simply appropriates the

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108. *Cf.* Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 446–47 (2014) (finding that "[v]iewed in terms of Congress' regulatory objectives," the fact that copyrighted content is performed via a new technological platform does not render the performance non-infringing).

109. See Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High-Piracy Environment?*, 27 HARV. J.L. TECH. 467 (2014).

110. *Id.* at 501–02.

111. *Id.* at 502.

112. See Stuart Dredge, *How 'Sleeping Giant' China Is Waking Up to Legal Music*, MUSIC:ALLY (Jan. 25, 2017), <https://musically.com/2017/01/25/how-sleeping-giant-china-is-waking-up-to-legal-music/>; Rhian Jones, *'Accessing Publishing Money in China Is Incredibly Complex. This is the Beginning of a Marathon, Not a Gold Rush.'* MUSIC BUS. WORLDWIDE (July 16, 2020), <https://www.musicbusinessworldwide.com/accessing-publishing-money-in-china-is-incredibly-complex-this-is-the-beginning-of-a-marathon-not-a-gold-rush/>.

113. See Balganesch, *supra* note 11, at 1607–08.

114. Priest, *supra* note 109, at 514–20.

works' value.<sup>115</sup> This not only raises fundamental fairness concerns, but also abets the rise of powerful, exploitative, monopolistic intermediaries.<sup>116</sup>

Having identified what copyright incentivizes (commercial risk bearing and innovation), there are two important follow-up questions. First, who does copyright incentivize—authors, intermediaries, or both? Second, to what extent does an entrepreneurship theory of copyright provide guidance about the scope of copyright rights?

#### B. COPYRIGHT INCENTIVIZES RISK BEARING AND INNOVATION ACROSS THE WORK'S "VALUE CHAIN"

Commercial risk occurs along a continuum of creative activities, from the author's production of the work to the contributions made by intermediaries involved in the commercialization process. This is not only true for big-budget blockbuster machines. Small, independent creators also rely on intermediaries who provide funding, connections, guidance, expertise, creative input, and distribution, just as entrepreneurs rely on angel investors, advisors, distributors, and other partners.<sup>117</sup> Without professional intermediaries, the goods of authors and entrepreneurs would often fail to reach consumers, either because the products were not released at all or because they could not cut through the "clutter" of competing products to capture consumer mindshare.<sup>118</sup> "For artists, the more noise there is in the system, the more valuable become the players who can cut through it."<sup>119</sup> Moreover, the strict dichotomy between author and intermediary is anachronistic. Today, the roles have blurred even when an intermediary is involved. "Authors . . . now effectively work as partners with their publishing companies in the work of marketing and publicity—an expectation . . . that's felt to be included in the advance."<sup>120</sup>

The oversimplified notion of copyright "incentivizing creation" relies on and perpetuates an outdated, simplistic, "two-stage" economic model of creative production. In stage one, all the investment (capital plus innovation) is made up front. In stage two, the author recoups their investment.<sup>121</sup> In other words, the sunk costs are all made up front in a final, polished creative work,

115. *Id.* at 518–20.

116. *Id.*

117. *See* Barnett, *supra* note 62, at 401; DERESIEWICZ, *supra* note 14, at 45.

118. *See* DERESIEWICZ, *supra* note 14, at 57.

119. *Id.* at 61.

120. *Id.* at 70.

121. Robert Merges, *The Bridges of "IP County": Bringing Creative Works to Market*, Center for the Protection of Intellectual Property 7th Annual Conference Morning Keynote Address, (Oct. 23, 2019), <https://www.youtube.com/watch?v=DIN3tpoNXoI>; *see also* Sichelman, *supra* note 54, at 200.

followed by a marketing phase in which the investment is recouped. This two-stage model fails to capture the processes, investments, risks, and real-world incentive structures along the work's "value chain"—that is, "the steps required to take creative inspiration from a good idea to a finished product available in the market."<sup>122</sup> The romantic notion of the author toiling to produce a novel or software program captures at best just one stage in the development and commercial realization of the work—a stage at which only some of the value has been created.

The initial investment in an innovation is often smaller than the capital needed in the subsequent stages of scale-up, development, and commercialization.<sup>123</sup> Even if no property right were necessary to incentivize a particular act of authorship, a property right is often necessary to attract the funding needed to develop a work from idea to consumer-ready end product.<sup>124</sup> Although digital technologies have reduced some production and distribution costs, "many other tasks [in the copyright commercialization ecosystem] remain as expensive, cumbersome, or labor-intensive as before, even in a fully digitized world."<sup>125</sup> Most authors do not have the expertise, professional teams and networks, or war chests to perform all of the "channel functions" necessary to develop, refine, and promote a work.<sup>126</sup> Even if they did, it is hard to argue that an author's time and talent is best spent on marketing and distribution when that could be handled by full-time professionals.<sup>127</sup> In short, the notion of "incentivizing creativity" fails to account for the range of real-world risks and investments that copyright actually incentivizes and enables.<sup>128</sup> What really matters for copyright policy is not incentivizing the fabled moment of creation but rather incentivizing commercial risk bearing in the form of incurred opportunity costs and capital and in-kind investments—all directed toward innovating high-quality, consumable information goods.<sup>129</sup>

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122. Sean M. O'Connor, *IP Transactions as Facilitators of the Globalized Innovation Economy*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 203, 204 (Rochelle Dreyfuss, Diane L. Zimmerman & Harry First eds., 2010).

123. Merges, *supra* note 121.

124. See Barnett, *supra* note 62, at 404–06.

125. See ANITA ELBERSE, *BLOCKBUSTERS: HIT-MAKING, RISK-TAKING, AND THE BIG BUSINESS OF ENTERTAINMENT* 193 (2013).

126. *Id.* at 192–93.

127. *Id.*

128. See Barnett, *supra* note 62, at 404–06.

129. See *supra* Section III.A.2; see also Garon, *supra* note 89, at 1313.

Recent copyright scholarship has begun to replace the simplistic, outdated, two-stage model with a more realistic understanding of copyright's role in the creative work development process.<sup>130</sup> This scholarship focuses on the incentives copyright provides to intermediaries that support a range of production and commercialization activities from inception to publication and beyond. Jonathan Barnett, proposing an intermediary incentivization theory of copyright, argues that the conventional incentive narrative is inadequate since it fails to account for the more complex, multistage process of producing and commercializing information goods.<sup>131</sup> Even if one were to remove authorial incentives altogether, Barnett argues, copyright is fully justifiable on the grounds that it “supports the profit-motivated intermediaries that bear the high costs and risks involved in evaluating, distributing, and marketing content in mass-cultural markets.”<sup>132</sup> Julie Cohen rejects “the incentives-for-authors story” because it obscures copyright's real economic and cultural functions.<sup>133</sup> Cohen sees copyright's role in the contemporary information society as enabling “the provision of capital and organization so that creative work may be exploited.”<sup>134</sup> Sean Pager also rejects the standard “stylized and condensed account” of authorship that “elide[s] real-world authorial processes.”<sup>135</sup> But for Pager, copyright does not just incentivize commercial activity devoid of creativity. Rather, a commercialization theory of copyright is justified because copyrightable expression is produced “before, during, and after . . . commercialization” of a work, so the process of commercialization “is shot through with acts of authorship.”<sup>136</sup>

The common thread is that copyright incentivizes investment and innovation across a range of actors and commercialization stages. Barnett's article addresses most directly the role risk bearing plays in copyright incentives. However, his thesis is that copyright is justifiable even if it merely incentivizes intermediaries to bear the commercialization risks of production, publication, and distribution. To make the point, he accepts *arguendo* that individual authors' intrinsic motivations to create undermine copyright's theoretical foundations.<sup>137</sup> There is, however, no reason to assume that

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130. See Cohen, *supra* note 25, at 143; Barnett, *supra* note 62; Sean A. Pager, *The Role of Authorship in Commercialization and Copyright* (2015) (unpublished manuscript) (on file with the author) [hereinafter Pager, *Commercialization and Copyright*].

131. See Barnett, *supra* note 62, at 389.

132. *Id.*

133. Cohen, *supra* note 25, at 143.

134. *Id.*

135. Pager, *Commercialization and Copyright*, *supra* note 130.

136. *Id.*

137. Barnett, *supra* note 62, at 401.

commercialization risks do not fall on authors. Indeed, individual authors often bear the greatest risk in the commercialization value chain.<sup>138</sup> Intermediaries are generally in the business of managing risk by spreading it across large portfolios of creative properties.<sup>139</sup> Individual authors have no such ability to spread risk. The novelist, songwriter, or indie filmmaker commercially succeeds or fails entirely based on their investments in their own portfolio of works.<sup>140</sup>

The upshot is that monetary incentives are important as a matter of copyright theory and policy, but theory and policy are poorly served by a cramped and antiquated view of incentives as mere motivators of some primary creative act. Diverse individuals and entities are involved along the continuum from development to commercialization of the work, and they all need to be incentivized to bear the commercial risks of transforming the raw work into a viable product.<sup>141</sup>

### C. RISK BEARING AND THE SCOPE OF COPYRIGHT RIGHTS

Copyright is generally viewed as state intervention into the market for information goods.<sup>142</sup> Because information goods often require substantial sunk costs to produce but are exceedingly easy to copy once published, the state grants an exclusive right to the author to ensure the author a viable market upon publication.<sup>143</sup> If this incentive to publish were unnecessary, copyright would be deemed to be an unnecessary intervention that is unjustified because of the social costs it produces: reducing access to works, reducing opportunities to create follow-on or derivative works, hampering development of innovative content distribution models, and so on.<sup>144</sup> As noted in Part II, copyright skeptics charge that since many authors create for intrinsic reasons, much of the copyright apparatus may be social waste.<sup>145</sup> As I demonstrated

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138. See Garon, *supra* note 89, at 1314.

139. See Barnett, *supra* note 62, at 401.

140. See *id.* at 399 (“For all but the most risk-loving entities, an investment in any *single* creative production is economically irrational—that is, it promises a return that is less than normal expected profits.”); DERESIEWICZ, *supra* note 14, at 45 (noting that most cultural products are commercial failures, and therefore “[a]bsent [the support of commercialization intermediaries], as DIY individuals, artists are left to make one very bad bet: on themselves”).

141. The Supreme Court recently clarified that a copyright system that provides commercialization incentives to industry is constitutional. *Golan v. Holder*, 565 U.S. 302, 326–27 (2012) (holding that “[b]enefitting [U.S.] copyright-intensive industries . . . and inducing greater investment in the creative process” are constitutionally legitimate ways to “promote progress”).

142. See *infra* Part VI.

143. See *infra* Part VI.

144. See *infra* Section VI.C.

145. See *supra* notes 49–52 and accompanying text.

earlier in this Part, that line of reasoning is a blind alley because determining *ex ante* intrinsic or extrinsic authorial “motivations” is beside the point. What matters is authorial risk bearing and innovation. This raises the question of whether this revised conception of copyright incentives might be more useful for defining the scope of copyright than the prevailing, narrow utilitarian formulation.

For starters, entrepreneurship theory has something to say about the practicality and desirability of employing a utilitarian view of incentives that limits income to persuasion costs. After all, from a social welfare perspective, concerns about persuasion costs could apply to entrepreneurs, too. Schumpeter recognizes this and expressly considers the question of whether entrepreneurial rewards should be commensurate with their persuasion costs. He concludes that it is both unnecessary and unfruitful to determine the level of profit needed to “call forth precisely the ‘quantity of entrepreneurial services required.’ Such a quantity, although theoretically determinable, does not exist.”<sup>146</sup> He acknowledges that some entrepreneurial profit “may be much greater than that necessary to call forth the entrepreneurial services which were actually operated.”<sup>147</sup> Nevertheless, given the entrepreneur’s exposure to risk and uncertainty, Schumpeter argues that the potential for outsized profits serves as a critical incentive for prospective entrepreneurs.<sup>148</sup>

In other words, Schumpeter recognized that inefficiencies result from a system in which the entrepreneur’s claim to unlimited profits creates a mismatch between the entrepreneur’s persuasion costs and their potential profits. An efficient system would in theory limit profits to the entrepreneur’s persuasion costs. Nevertheless, he dismisses the idea for two reasons. First, determining the correct level of *ex ante* incentives and the correct level of desirable entrepreneurial activity is impossible.<sup>149</sup> Second, even if such a number were ascertainable, it would fail to account for profit’s signaling effects across our entrepreneurship-driven economy.<sup>150</sup> We simply cannot calculate the systemwide effect of imposing bespoke profit ceilings, because excessive

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146. SCHUMPETER, *THEORY OF ECONOMIC DEVELOPMENT*, *supra* note 81, at 154.

147. *Id.* at 154–55.

148. *Id.*; see also SCHUMPETER, *CAPITALISM*, *supra* note 81, at 73–74 (“Spectacular prizes much greater than would have been necessary to call forth the particular effort are thrown to a small minority of winners, thus propelling much more efficaciously than a more equal and more ‘just’ distribution would, the activity of that large majority of businessmen who receive in return very modest compensation or nothing or less than nothing, and yet do their utmost because they have the big prizes before their eyes and overrate their chances of doing equally well.”). Regarding Schumpeter’s views on risk and uncertainty, see *supra* note 81.

149. SCHUMPETER, *THEORY OF ECONOMIC DEVELOPMENT*, *supra* note 81, at 154–55.

150. *Id.* at 155; SCHUMPETER, *CAPITALISM*, *supra* note 81, at 73–74.

profits by one entrepreneur have a powerful incentivizing effect on peers.<sup>151</sup> F.M. Scherer supplied empirical support for Schumpeter's hypothesis that entrepreneurs are incentivized by a "gambler's appetite" for outsized profits, and he extends the idea to "a theory of incentives for innovation in technology and other creative endeavors."<sup>152</sup>

Accordingly, although profits perform an incentivizing function in entrepreneurship theory, there is little interest in divining the precise level of profit incentive required to inspire an efficient level of entrepreneurial activity. Some economists, notably Israel Kirzner, have sought to better understand *how* profit functions as an incentive.<sup>153</sup> But regarding how much profit an entrepreneur should be entitled to pocket, Harvey Leibenstein's view seems largely representative: "whatever they can, or are clever enough to arrange to get."<sup>154</sup>

So, for starters, entrepreneurship theory suggests that proposals to cap authorial income at an author's persuasion costs are impractical and normatively undesirable. Nevertheless, a laissez-faire approach to copyright income cannot work because the economic logic and social purpose of copyright—not to mention the Constitution—necessitate limits on authorial rights. As noted above, however, utilitarian incentive theory has had surprisingly little direct influence on copyright's limiting doctrines.<sup>155</sup> Instead, copyright's limiting doctrines are rooted in more direct interest-balancing principles. Professor Merges has identified several such principles, which he calls "midlevel principles" because they operate as the intermediaries between

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151. SCHUMPETER, THEORY OF ECONOMIC DEVELOPMENT, *supra* note 81, at 154–55; SCHUMPETER, CAPITALISM, *supra* note 81, at 73–74.

152. *See* Scherer, *supra* note 66, at 5 (concluding that "[f]irst and most obvious[ly], patents and copyrights ought not to be revoked or weakened simply because an innovator has made 'too much' money from his creation, for the prospect of a large reward is a crucial feature of the skewness-based incentive system.").

153. *See generally* McCaffrey, *supra* note 10 (discussing and expanding upon Kirzner's theory of entrepreneurial "alertness" to profit incentives).

154. Harvey Leibenstein, *The General X-Efficiency Paradigm and the Role of the Entrepreneur*, in TIME, UNCERTAINTY, AND DISEQUILIBRIUM 127, 136 (Mario J. Rizzo ed., 1979). This is not to say that enormous entrepreneurial profits do not raise distributive justice concerns; they do. And some corporate law scholars argue that corporate law should prioritize general welfare over profit maximization. *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992). But income inequality and distributive injustice are highly complex systemic problems that defy simplistic solutions such as capping entrepreneurial income. *See, e.g.*, F. Spagnoli, *Income Inequality: What's Wrong with It and What's Not*, in WHAT DO WE DO ABOUT INEQUALITY: IDEAS FOR DIVERGENT SOCIETIES 193, 193–211 (Chris Oestereich ed., 2016). The causes and social and economic effects of income inequality are numerous and complex, as are the effects of potential remedial measures. *See id.*

155. *See supra* notes 63–65 and accompanying text.

abstract theory and doctrine, including: proportionality (IP rights should be tailored proportionally to the creator's contribution); nonremoval (in order to ensure abundant raw materials for all, some resources should never be eligible for appropriation from the public domain); and efficiency (legal entitlements should be cheaply and expeditiously allocated to their highest-valued use).<sup>156</sup> These midlevel principles are enacted through copyright mitigation doctrines such as fair use, originality, the idea/expression distinction, *scènes à faire*, and term limits.<sup>157</sup> These principles will doubtless continue to guide the evolution of copyright doctrine.

Nevertheless, the entrepreneurship framing of incentives (that copyright incentivizes and rewards risk bearing plus innovation) *can* guide efforts to delimit copyright entitlements. Using innovation as a factor for determining the scope of rights requires little attention here. Innovation is already a fundamental determinant of scope through the originality doctrine. The scope of copyright protection a work receives is coterminous with the amount of originality with which the author has imbued the work.<sup>158</sup>

With regard to risk bearing as a factor in determining scope, the justification for copyright entitlements is arguably weaker the less economic risk is involved in the work's production and commercialization. However, it would be impossible—not to mention a bad idea normatively—to apply this principle at too granular a level. For example, we should hesitate to say that a big-budget film is riskier than a novel or a song. As noted previously, producing and commercializing the novel or song may require an enormous commitment of time and resources from an individual, making it comparatively riskier than a tentpole production is for a deep-pocketed studio with a diverse portfolio of films.<sup>159</sup> Every production occurs under unique circumstances. Likewise, we would not want a rule that limits the superstar author's rights simply because, due to their financial status or fame, they likely face less financial risk than an unknown “starving” artist. Again, there are too many variables at the individual level to fashion a workable or desirable rule.

There are some categories of works, however, that we know with reasonable confidence are presumptively low- or no-risk productions. It could make sense to afford only very thin or no protection to such works. One category discussed in depth in Section VII.D.1, below, is scholarly articles

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156. See MERGES, *supra* note 33, at 139–58. Merges argues that the efficiency principle, which encompasses incentive theory, is insufficient to be a foundational intellectual property theory. *Id.* at 2, 6.

157. See *id.* at 139–94.

158. See *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 347–48 (1991).

159. See *supra* notes 139–140 and accompanying text.

written by academics employed at higher education institutions. Generally, the authors of those articles and their institutions incur no commercial risk in the production of those works.<sup>160</sup> The same is true for legal briefs or ad copy produced for paying clients. In such cases, the authors—including institutional or corporate authors—have been made whole for their efforts through payment and there are no market ambitions for the work. Personal communications—letters and emails—also generally involve no commercial risk. Of course, all these categories of works are presently covered by copyright law, and that is unlikely to change.<sup>161</sup> But tailoring is possible, and Section VII.D, below, discusses how commercial risk might be used as a factor in fair use and substantial similarity analyses to limit the scope of rights in some kinds of works.

Naturally, establishing classifications presents inevitable challenges. For example, commissioned works elude classification when they are not works made for hire but the author was paid for them. In such cases, the party commissioning the work may have done so with the expectation of acquiring the copyright and marketing the work. The commissioning party and ultimate copyright recipient is then incurring risk while the author, in whom copyright initially vests, is not. It would be a bad idea in such instances to consider only the author's risk (or lack thereof). In some industries, such as photography, it has been customary for the author to retain the copyright to the commissioned work even after being paid, although those industry practices may be in transition.<sup>162</sup> Ultimately, the level of risk can and should be a factor when considering the scope of copyright rights and infringement. But as with many aspects of copyright scope-setting, context matters. An elegant, one-size-fits-all rule is therefore unlikely.

Having discussed how entrepreneurship theory can be used to inform copyright theory, the next Part makes the case that authors are indeed analogous to entrepreneurs.

#### IV. THE DEFINING CHARACTERISTICS OF THE ENTREPRENEUR

The term “entrepreneur” and the general concept were introduced into economic analysis by Cantillon in his *Essay on the Nature of Trade in General*,

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160. See *infra* Section VII.D.1.

161. See 17 U.S.C. § 102(a) (2018).

162. See Jessica Silbey, Eva E. Subotnik & Peter C. DiCola, *Existential Copyright and Professional Photography*, 95 NOTRE DAME L. REV. 263, 296–97 (2019).

posthumously published in 1755.<sup>163</sup> “Entrepreneur” was a French term whose eighteenth-century meaning was “one who undertakes a project.”<sup>164</sup>

Since Cantillon’s time, scholars from diverse fields including economics, psychology, sociology, and strategy have brought their disciplinary foci to bear on the question of how to define “entrepreneur.”<sup>165</sup> Many theorists seek to define the term by identifying unique personality traits that distinguish the entrepreneur from other economic actors.<sup>166</sup> Others view entrepreneurship as engagement in a process rather than as a personality type.<sup>167</sup> Still others build theoretical models based on entrepreneurial behavior (rather than intrinsic traits) or cognitive processes that drive entrepreneurial action.<sup>168</sup> And this far from exhausts the theoretical lenses through which the meaning of “entrepreneur” is explored.

Entrepreneurship researchers across disciplines acknowledge the difficulty of pinning down a definitive definition of “entrepreneur.”<sup>169</sup> Despite the definitional challenges, two definitive qualities of the entrepreneur emerge with relative consistency throughout interdisciplinary entrepreneurship literature. The first is risk-taking in the face of persistent exposure to uncertainty; the second, innovation. I add commercialization as a third for present purposes, as it is usually at least implicit in the definition of “entrepreneur.”<sup>170</sup> The

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163. HÉBERT & LINK, *supra* note 76, at 15.

164. LINK & SIEGEL, *supra* note 78, at 14.

165. See, e.g., Sophie Boutillier & Dimitri Uzunidis, *The Theory of the Entrepreneur: From Heroic to Socialized Entrepreneur*, 14 J. INNOVATION ECON. & MGMT. 9 (2014); Kelly G. Shaver & Amy E. Davis, *The Psychology of Entrepreneurship: A Selective Review and a Path Forward*, in THE WILEY HANDBOOK OF ENTREPRENEURSHIP, *supra* note 29, at 95; Howard E. Aldrich, *Entrepreneurship*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 451 (Neil J. Smelser & Richard Swedberg eds., 2005).

166. See Peter G. Klein, *Entrepreneurs and Creative Destruction*, in THE 4% SOLUTION: UNLEASHING THE ECONOMIC GROWTH AMERICA NEEDS 116, 118 (Brendan Minter ed., 2012) (describing what he calls “occupational theories” of the entrepreneur that focus on describing the characteristics of individuals including personality traits, age, education, and so on that distinguish entrepreneurs from other individuals who choose self-employment).

167. See Peter van der Zwan & Roy Thurik, *Entrepreneurship as a Process: Empirical Evidence for Entrepreneurial Engagement Levels*, in THE WILEY HANDBOOK OF ENTREPRENEURSHIP, *supra* note 29, at 25–35.

168. See Bruce T. Teague & William B. Gartner, *Toward a Theory of Entrepreneurial Behavior*, in THE WILEY HANDBOOK OF ENTREPRENEURSHIP, *supra* note 29, at 71–94.

169. See S. M. Kanbur, *A Note on Risk Taking, Entrepreneurship, and Schumpeter*, in HISTORY OF POLITICAL ECONOMY 489, 489 (1980) (“Entrepreneurship is undoubtedly a candidate for the phenomenon which is most emphasised yet least understood by economists.”).

170. See, e.g., Mark Casson & Catherine Casson, *The History of Entrepreneurship: Medieval Origins of a Modern Phenomenon*, 56 BUS. HIST. 1223, 1225 (2014) (noting that Schumpeter, for example, “was adamant that the entrepreneur did not merely invent . . . but actually

following Sections flesh out each of these characteristics and highlight how the approaches of major theorists have contributed to their meaning.

A. RISK BEARING IN THE FACE OF MARKET UNCERTAINTY<sup>171</sup>

If one characteristic is most central and enduring to the concept of the entrepreneur, it is the entrepreneur's exposure to the economic risk that results from market uncertainty.<sup>172</sup> At the dawn of entrepreneurial theory, Cantillon already distinguished between economic free agents who are responsible for generating their own income (entrepreneurs) and fixed-wage earners such as military officers, courtiers, and domestic servants, who do not bear the same level of risk.<sup>173</sup> Cantillon recognizes that as a free agent, the entrepreneur lacks the economic stability of the salaried employee and is therefore fully exposed to the market's unpredictability.<sup>174</sup> Cantillon and Thünen expressly recognize that opportunity costs are included among the risks that entrepreneurs bear but their salaried counterparts do not.<sup>175</sup>

Knight argues entrepreneurship is coterminous with uncertainty.<sup>176</sup> He observes that in a world without uncertainty—that is, without variables that are unknowable in advance—there would be no risk: producers would know how much of what goods to produce in order to satisfy demand.<sup>177</sup> They would

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commercialised their invention by committing resources to implement the invention and to bring it to market. The entrepreneur was therefore a business actor and not merely a creative or artistic individual.”)

171. I do not distinguish between “risk bearing” and “risk taking,” although some economists argue the two are conceptually distinct. See Joseph A. Giacalone, *Entrepreneurial Theory and American Business History: A Survey*, 26 REV. SOCIAL ECONOMY 156, 159–60 (1968).

172. See Casson & Casson, *supra* note 170, at 1225; Sander Wennekers & André van Stel, *Types and Roles of Productive Entrepreneurship: A Conceptual Study*, in THE WILEY HANDBOOK OF ENTREPRENEURSHIP, *supra* note 29, at 37–70. Joseph Schumpeter is the notable exception to proponents of the idea that uncertainty lies at the heart of entrepreneurship. Schumpeter believes that the uncertainty risks fall primarily on the owner of the means of production rather than the entrepreneur. See Wennekers & van Stel, *supra*; SCHUMPETER, THEORY OF ECONOMIC DEVELOPMENT, *supra* note 81, at 137. *But see supra* note 81 (suggesting entrepreneurial risk and market uncertainty did implicitly inform Schumpeter's theory of the entrepreneur).

173. RICHARD CANTILLON, AN ESSAY ON ECONOMIC THEORY 76 (Mark Thornton ed., Chantal Saucier trans., 2010) (1755). Although Cantillon views entrepreneurs as free agents, he does not view them as having true economic independence. See *id.* He distinguishes fixed-wage earners and entrepreneurs from landowners, which he views as the only economically independent class because land wealth conferred economic independence; all others were directly or indirectly dependent on landowners for work. *Id.*

174. *Id.* at 74.

175. HÉBERT & LINK, *supra* note 76, at 20, 52–53.

176. KNIGHT, *supra* note 9 at 267–68.

177. *Id.*

focus purely on execution—filling known demands—and entrepreneurial ability would have no economic value.<sup>178</sup> But in our world of uncertainty, a class of entrepreneurs inevitably emerges to help remedy the market disequilibrium uncertainty has wrought.<sup>179</sup> Entrepreneurs possess the foresight to predict consumer demand, the knowledge and ability to reallocate their resources accordingly, and the courage to bear the associated risks.<sup>180</sup> Successfully overcoming uncertainty requires an actor with inventive capacity to bridge the gap between existing knowledge and unknown market demand.<sup>181</sup>

For centuries, economists have theorized that economic uncertainty and the risks entrepreneurs bear justify comparatively higher profits for successful entrepreneurs.<sup>182</sup> According to Thünen, for example, the right to entrepreneurial profits is justified by the increased risk borne by the entrepreneur, and the potential for high profits encourages entrepreneurial activity in the face of risk.<sup>183</sup> Pierson similarly posits that the higher upside potential of entrepreneurial profits as compared to wages reflects the entrepreneur's increased risk as a self-reliant free agent.<sup>184</sup>

Why do entrepreneurs forgo the stability of fixed wages to take on the risk, uncertainty, and “effort and anxiety” (in Pierson's words) that accompany them?<sup>185</sup> The desire for profits that exceed the average wage is clearly a major motivating factor. But for centuries, theorists have recognized intrinsic motivations emanating from a desire for professional autonomy.<sup>186</sup> In short, entrepreneurial self-reliance and resultant risk in the face of uncertainty suffuse classical and contemporary entrepreneurship literature.<sup>187</sup>

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178. *Id.* at 268–69.

179. *Id.*

180. *Id.* at 268. Knight famously differentiates between uncertainty and risk: entrepreneurs bear risks due to uncertainty, but not all risks are uncertain; some risks are knowable and calculable. *Id.* at 233.

181. Joaquín Guzmán-Cuevas, *Toward a Taxonomy of Entrepreneurial Theories*, 12 INT'L SMALL BUS. J. 77, 81 (1994) (observing that Knight's differentiation between risk and uncertainty “induced him to view the businessman not as a recipient of fixed, contractual income, but rather, as a variable agent dependent upon his inventive capacity”).

182. *See, e.g.*, JEAN-BAPTISTE SAY, A TREATISE ON POLITICAL ECONOMY; OR THE PRODUCTION, DISTRIBUTION, AND CONSUMPTION OF WEALTH 188 (C.R. Prinsep trans., 2001) (1880); LINK & SIEGEL, *supra* note 78, 18–19.

183. HÉBERT & LINK, *supra* note 76, at 53 (citing Thünen's *The Isolated State*, Vol. II (1850)).

184. PIERSON, *supra* note 84, at 234–35, 339–40.

185. *Id.* at 236.

186. *See* Boutillier & Uzunidis, *supra* note 165, at 14; Ivan Bull & Gary E. Willard, *Towards a Theory of Entrepreneurship*, 8 J. BUS. VENTURING 183, 188 (1993).

187. *See* Hébert & Link, *supra* note 76, at 135.

## B. INNOVATION

Risk-taking is a necessary but not sufficient condition of entrepreneurship. As Peter Drucker explains, the individual who opens a neighborhood delicatessen or family restaurant is surely taking an economic risk, but that alone does not make them an entrepreneur. Rather, a distinguishing entrepreneurial trait is the aptitude for innovation—the ability to “create something new, something different” or “change or transmute values.”<sup>188</sup>

For many theorists, uncertainty and risk are the antecedents of entrepreneurial innovation. The entrepreneur’s innovative capacity arises from their exposure to uncertainty and risk: the successful entrepreneur must have the capacity to invent solutions that enable them to prosper in a perennially uncertain, ever-evolving market.<sup>189</sup> In the crucible of market uncertainty and adversity, the entrepreneur becomes, in Thünen’s words, “an inventor and explorer in his field.”<sup>190</sup>

Schumpeter, whose “view has come to dominate the field” of entrepreneurship studies, sees innovation as a sine qua non for entrepreneurship.<sup>191</sup> But unlike Knight, who viewed innovation as a force that restores equilibrium, Schumpeter sees entrepreneurial innovation as a destabilizing, destructive force.<sup>192</sup> For Schumpeter, this is a feature of entrepreneurship, not a bug. Equilibrium signals stasis, and a stagnant economy presents little opportunity for development.<sup>193</sup> Seeking opportunity, entrepreneurs are constantly pushing the envelope of known possibilities to create new markets while ultimately rendering extant industry obsolete.<sup>194</sup> The entrepreneur and their innovation power this “creative destruction” of existing demand and are therefore the central drivers of a dynamic economy.<sup>195</sup>

For Schumpeter, the innovation that leads to creative destruction is the generation of “new combinations” of existing “materials and forces within our

188. PETER F. DRUCKER, INNOVATION AND ENTREPRENEURSHIP 21–22 (1985).

189. Boutillier & Uzunidis, *supra* note 165, at 10.

190. See LINK & SIEGEL, *supra* note 78, at 19 (quoting Thünen’s *The Isolated State*, Vol. II (1850)).

191. *Id.* at 14; see also Bull & Willard, *supra* note 186, at 186 (“Schumpeter’s definition [of the entrepreneur] is acceptably precise. . . . Recent attempts at redefinition [by Murray, Stevenson and Gumpert, and Kirzner] . . . add insight but, upon closer examination, merely rephrase the Schumpeter definition.”). But see Aldrich, *supra* note 165, at 455 (“Today, few academic researchers studying entrepreneurship refer to Schumpeter, and fewer still actually use his ideas to study the creation of new enterprises.”).

192. SCHUMPETER, CAPITALISM, *supra* note 81, at 84.

193. *Id.*

194. *Id.*

195. *Id.*

reach.”<sup>196</sup> He thus recognizes that creative destruction, like all innovation, is an incrementally additive process—it undermines and ultimately replaces the status quo by building upon and improving it. Innovative new combinations include combinations that generate new kinds of products or new markets.<sup>197</sup> By focusing on the creation of new markets, Schumpeter proposes a demand-side theory of entrepreneurship in which the entrepreneur, unlike an ordinary manager or business owner, creates new markets rather than merely seeks opportunities to fill existing demand.<sup>198</sup> Entrepreneurs are the relatively few individuals who possess a gift for identifying products and markets that do not yet exist. This idea might be summarized by citing the frequent media portrayals of late Apple co-founder and CEO Steve Jobs as a visionary who created products that consumers did not even know they needed.<sup>199</sup>

### C. COMMERCIALIZATION

Some theorists include in their definition of “entrepreneur” any individuals in society who “reallocate their resources in response to changes in economic condition.”<sup>200</sup> It is fashionable to use the term in connection with all manner of change agents, from “social entrepreneurs”<sup>201</sup> to “norm entrepreneurs.”<sup>202</sup> Schultz argues that ordinary people find innovative, “entrepreneurial” solutions to remedy inefficiencies in daily tasks, and that these solutions in the aggregate add substantial untracked value to the economy.<sup>203</sup>

For present purposes, I limit the definition of “entrepreneur” to reflect its more common meaning of an overtly commercial actor. Commercialization—the bringing of one’s innovation to market—is implicitly or explicitly central to economic and lay conceptions of the entrepreneur.<sup>204</sup> In Schumpeter’s view, for example, all entrepreneurs are innovators but not all innovators are entrepreneurs.<sup>205</sup> What distinguishes the entrepreneur from the mere inventor or creator is the volitional act of bringing the innovation to market.<sup>206</sup>

196. SCHUMPETER, THEORY OF ECONOMIC DEVELOPMENT, *supra* note 81, at 65.

197. *See* LINK & SIEGEL, *supra* note 78, at 24.

198. *Id.* at 20.

199. *See, e.g.*, Peter Noel Murray, *How Steve Jobs Knew What You Wanted*, PSYCH. TODAY (Oct. 13, 2011), <https://www.psychologytoday.com/us/blog/inside-the-consumer-mind/201110/how-steve-jobs-knew-what-you-wanted>.

200. Schultz, *supra* note 74, at 441.

201. *See* Roger L. Martin & Sally Osberg, *Social Entrepreneurship: The Case for Definition*, STAN. SOCIAL INNOVATION REV., Spring 2007, at 29.

202. *See* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 36 (1997).

203. Schultz, *supra* note 74, at 438.

204. *See* Hébert & Link, *supra* note 76, at 139.

205. *See* SCHUMPETER, THEORY OF ECONOMIC DEVELOPMENT, *supra* note 81, at 88–89.

206. *See* LINK & SIEGEL, *supra* note 78, at 24.

The entrepreneur is not always the sole entity that commercializes the product. Most businesses have investors and partners who work with them throughout the “continuous process that starts with the generation of an idea which then needs to be elaborated, refined, and implemented with the help of entrepreneurial actions.”<sup>207</sup> The key is that creativity or innovation alone does not give rise to entrepreneurship; entrepreneurship requires innovation plus market implementation.<sup>208</sup>

These then, in broad strokes, are the essential qualities that economic literature attributes to entrepreneurs: (1) risk-taking in the face of market uncertainty, (2) innovation, and (3) commercialization. Part V will show how authors possess all these characteristics and are therefore entrepreneurs. However, this first requires refuting some incorrect assumptions about entrepreneurs that, if left unchecked, might weaken the argument that authors share their essential qualities. Following, therefore, are four characteristics that are *not* emphasized in the literature as central to defining the entrepreneur.

#### D. CHARACTERISTICS NOT ESSENTIAL TO THE DEFINITION OF “ENTREPRENEUR”

##### 1. *Entrepreneurism Is Not Limited to Particular Industries or Types of Commercial Actors*

There is no basis in entrepreneurship theory to exclude authors as a category from consideration as entrepreneurs. It is well accepted in the literature that entrepreneurship is not confined to specific industries or specific types of economic actors.<sup>209</sup> Indeed, entrepreneurship theories are often framed around identifying entrepreneurial functions, processes, behaviors, or common characteristics.<sup>210</sup>

This capacious concept of the entrepreneur has existed since the very origins of entrepreneurship theory. Cantillon observes that entrepreneurs in his day were a wide range of economic actors including not only merchants and tradespeople, but also “journeymen artisans” and the “entrepreneurs of their own labor in art and science, like painters . . . .”<sup>211</sup> Entrepreneurs are not

207. Maike Lex & Michael M. Gielnik, *Creativity and Entrepreneurship: A Process Perspective*, in THE WILEY HANDBOOK ON ENTREPRENEURSHIP, *supra* note 29, at 139, 140.

208. *See id.* at 140 (“Entrepreneurship goes beyond creativity because it does not only comprise the generation of novel and useful ideas but also the refinement and implementation of these ideas into a viable business opportunity.”); Casson & Casson, *supra* note 170, at 1225.

209. *See* Wennekers & van Stel, *supra* note 172, at 37.

210. *See* Klein, *supra* note 166, at 118–20; van der Zwan & Thurik, *supra* note 167, at 25–35; Teague & Gartner, *supra* note 168, at 71–94; Wennekers & van Stel, *supra* note 172, at 37–70.

211. CANTILLON, *supra* note 173, at 75–76.

defined by their industry or executive title. It is the investment in one's own innovative, commercial endeavor under the fog of risk and uncertainty that defines the entrepreneur.

### 2. *Entrepreneurs Respond to Intrinsic Motivations*

Although the right to entrepreneurial profits arising from innovative contributions and risk bearing is an important aspect of entrepreneurship theory, an emphasis on extrinsic over intrinsic motivations is not. Modern entrepreneurship theorists understand that human beings are driven by a complex mix of intrinsic and extrinsic motivations. Bull and Willard's proposed theory of the entrepreneur, for example, identifies "task-related motivation" and "expectation of gain for self" as necessary conditions for entrepreneurship, expressly including in the latter economic as well as "psychic" benefits.<sup>212</sup> The words of one contemporary entrepreneur succinctly capture the mixed nature of entrepreneurial motivations: "People create companies because they enjoy it, they love the challenge, and because they think they may be able to make a lot of money."<sup>213</sup>

Knight and Schumpeter viewed intrinsic motivations as significant or even primary drivers of entrepreneurship. In Knight's view, the true entrepreneurial motivation is "the desire to excel, to win at a game . . ." <sup>214</sup> For Schumpeter, important intrinsic motivations run the gamut from the dream of founding one's own kingdom to the "desire to succeed for . . . not the fruits of success, but [for] success itself" to "[t]he joy of creating, of getting things done, or simply exercising one's energy and ingenuity."<sup>215</sup> Bull and Willard note that empirical research supports Knight and Schumpeter's intuition that primary motivations for entrepreneurs are often intrinsic and nonpecuniary.<sup>216</sup>

### 3. *Not All Entrepreneurial Innovation Is Radical or Disruptive*

Even authors who are not radical innovators may be considered entrepreneurs. The entrepreneurial archetype is the generational visionary whose innovations upend and reinvent entire industries: Henry Ford, Ray Kroc, Steve Jobs, Bill Gates, Elon Musk, and so on. But a definition of "entrepreneur" would be thin indeed if it includes only household names. Even incremental entrepreneurial innovation at smaller scales increases social

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212. Bull & Willard, *supra* note 186, at 188.

213. Kevin P. Ryan, *No, The "Millionaire's Tax" Will Not Make Entrepreneurs Like Me Work Any Less*, BUS. INSIDER (Sept. 20, 2011), <https://www.businessinsider.com/kevin-ryan-millionaires-tax-2011-9>.

214. KNIGHT, *supra* note 9, at 360.

215. SCHUMPETER, *THEORY OF ECONOMIC DEVELOPMENT*, *supra* note 81, at 93.

216. *See* Bull & Willard, *supra* note 186, at 189.

welfare.<sup>217</sup> It may be many incremental innovations, rather than a lone earth-shaking innovation, that gradually “destroy” and replace the incumbent industrial model in the Schumpeterian sense.

#### 4. *The Entrepreneur Need Not Be a Small Business or Sole Proprietor*

Although the classic “heroic” entrepreneur is the sole-proprietor or small business owner,<sup>218</sup> it is widely accepted in modern entrepreneurship theory that entrepreneurship is not limited to the sole proprietor or start-up business.<sup>219</sup> Managers and other employees in firms (so-called “intrapreneurs”), and even the firm itself, are all capable of entrepreneurial activity.<sup>220</sup> Drucker argues that size is not an obstacle to entrepreneurial activity and innovation.<sup>221</sup> Rather, legacy-market path dependence is large firms’ primary obstacle to entrepreneurial experimentation.<sup>222</sup> Developing an entrepreneurial commitment and culture “takes special effort” for large companies.<sup>223</sup>

## V. THE AUTHOR AS ENTREPRENEUR

This Part demonstrates that authors possess the key characteristics that define entrepreneurs: (1) authorial endeavors expose authors to market uncertainty and the concomitant risks, (2) their work is inherently innovative, and (3) many authors are commercial actors.

### A. MARKET UNCERTAINTY AND RISK PREDOMINATE THE AUTHOR’S EXPERIENCE

Like entrepreneurs, authors are quintessential economic risk-takers.<sup>224</sup> Indeed, investment into intangible assets in general is characterized by greater

217. See Wennekers & van Stel, *supra* note 172, at 45–50. Even imitative entrepreneurs play an important role in diffusing innovations, and they often become incremental innovators as they adapt imitated business models for particular markets or cultural contexts. See *id.* at 47–48. For example, Hannah Orwa Bula notes that many entrepreneurs in Kenya engage in “creative imitation” (borrowing Drucker’s term). Hannah Orwa Bula, *Evolution and Theories of Entrepreneurship: A Critical Review on the Kenyan Perspective*, 11 INT’L J. BUS. & ECON. 81, 91 (2012). That is, they inventively adapt to their own market context innovations created elsewhere. *Id.*

218. See Boutillier & Uzunidis, *supra* note 165.

219. See, e.g., DRUCKER, *supra* note 188, at 147; Giacalone, *supra* note 171, at 159 (describing views of James Strauss equating the entrepreneur with the firm); Mark Casson, *Entrepreneurship: Theory, Institutions and History*, 58 SCANDINAVIAN ECON. HIST. REV. 139, 143 (2010).

220. Wennekers & van Stel, *supra* note 172, at 31.

221. DRUCKER, *supra* note 188, at 148.

222. *Id.*

223. *Id.* at 149.

224. See Andres Sawicki, *Risky IP*, 48 LOY. U. CHI. L.J. 81, 102–04 (2016).

uncertainty and higher risk.<sup>225</sup> This is especially true for authors: exposure to market uncertainty is hardwired into their profession. Authors commit resources and make capital and in-kind investments—often substantial—into an endeavor before ever knowing exactly how the project will turn out. There is no guarantee that a viable market will exist for most novels, songs, films, books, or works of fine art, even if the author has a track record of success.<sup>226</sup>

Krueger stresses the enormous role that luck plays in the success of creatives.<sup>227</sup> Even seasoned industry professionals, “with much at stake and years of experience, have difficulty picking winners.”<sup>228</sup> Krueger notes that music legends such as Elvis and the Beatles were famously passed on by record labels, while other artists in whom labels invested heavily as “sure things” were commercial flops.<sup>229</sup> A Hollywood adage holds that “nobody knows anything” when it comes to which creations will be successful.<sup>230</sup> In short, authors’ professional lives are defined by pervasive conditions of uncertainty and risk.

Even successful authors perpetually face uncertainty from the ever-shifting market. They must compete with new author-innovators who aim to “creatively destroy” the current paradigm, transform the market, and render existing works obsolete.<sup>231</sup> Moreover, authorship is often riskier than producing tangible goods. It is comparatively harder for entrepreneurs who

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225. See HASKEL & WESTLAKE, *supra* note 88, at 86–87.

226. See KRUEGER, *supra* note 14, at 109. Glynn Lunney rejects this idea, arguing that copyright intermediaries such as record labels have a good idea which works are likely to be popular, so there is relatively little uncertainty in the copyright industries. LUNNEY, *supra* note 3, at 50–55. “Broader copyright,” Lunney argues, is therefore unnecessary “as a form of insurance” against uncertainty. *Id.* at 49. To demonstrate this empirically, Lunney shows that “on average, Taylor Swift and her record label were able to identify the best song [on each of her albums] and release it first.” *Id.* at 53. Of course, there are countless counterexamples of highly anticipated works that were commercial flops. See KRUEGER, *supra* note 14, at 109–10. Further, the period when a superstar’s works are already “in the can” and ready for release is not the ideal timeframe to consider from the standpoint of uncertainty. Uncertainty still exists at that point, but it is less than the uncertainty that exists at the time the author decides to invest in the initial creation of the work. The decision to be an author and invest in the creation of as-yet totally unknown works is fraught with a high degree of uncertainty. The key point is, the act of speculative creation unremunerated at the development phase always entails a higher degree of risk than creation in a salaried position, and thus there exists the need for a property right as compensation for speculative creation.

227. KRUEGER, *supra* note 14, at 106–16.

228. *Id.* at 109.

229. *Id.* at 109–10.

230. See Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 ARIZ. L. REV. 837, 859 (2007).

231. *Id.* at 874.

produce only intangibles to attract investment; as noted above, the salvage value of a failed copyrighted work is potentially zero.<sup>232</sup>

The empirical literature demonstrates the prevalence of market uncertainty and risk in the creative industries, especially for independent creators. In his empirical study of working musicians in China, Jiarui Liu describes the “inherent uncertainty” in entertainment markets and the resulting riskiness of investing in creative works.<sup>233</sup> He notes the prevalence in China of “self-funded artists,” a model in which “the artist rather than the music company shoulders all investment risk.”<sup>234</sup> This is a trend for the arts in the United States as well.<sup>235</sup> Peter DiCola observes in his empirical analysis of professional musician income, “Each musician is like his or her own small business; musicians have to be ready to adjust to different opportunities and changing consumer demand.”<sup>236</sup> “Different opportunities and changing demand” are euphemisms for market uncertainty and risk. As one musician told William Deresiewicz, “To be a professional musician means you’re a successful entrepreneur, and most businesses fail.”<sup>237</sup> Deresiewicz reports that creatives’ income is “not only low, [it] can fluctuate wildly,” easily varying “from year to year or month to month, by a factor of five to ten.”<sup>238</sup> Drawing from interdisciplinary literature on creativity, Andres Sawicki argues that creative individuals may be predisposed to seek risk and that working under uncertain conditions may enhance the creative process.<sup>239</sup>

Much authorial risk bearing, like entrepreneurial risk bearing, stems from trading a predictable salary or wage for the freedom and instability of betting on one’s own talents. Silbey reports that “[t]he downside [for creators] of going it alone is the uncertainty of IP’s payoff and the lack of commensurate pay for artistic production.”<sup>240</sup> For many of the creators she interviewed, the independence they enjoy as creative free agents “trump[s] the fear of making a risky investment in creative or innovative work and is worth the risk of financial uncertainty.”<sup>241</sup> At the same time, Deresiewicz reports that the

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232. See HASKEL & WESTLAKE, *supra* note 88, at 70.

233. Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, 38 COLUM. J.L. & ARTS 476, 493, 530 (2015).

234. *Id.* at 493–94.

235. DERESIEWICZ, *supra* note 14, at 68–85.

236. Peter DiCola, *Money from Music: Survey Evidence on Musicians’ Revenue and Lessons about Copyright Incentives*, 55 ARIZ. L. REV. 301, 336 (2013).

237. DERESIEWICZ, *supra* note 14, at 69.

238. *Id.* at 84.

239. Sawicki, *supra* note 224, at 110.

240. SILBEY, *supra* note 18, at 93.

241. *Id.*

excessive self-reliance many creatives experience in today's increasingly disintermediated media market exacts a serious toll on their personal lives, health, and creativity.<sup>242</sup> In other words, autonomy comes with significant costs and risk.

## B. AUTHORS INNOVATE

Authors, to use Schumpeter's terminology, create new combinations out of existing material as a matter of course. As a result of this process the author creates a new "product" (a work) that has never existed before in that form. Indeed, to obtain a marketable property right—a copyright—in a new work of authorship requires that the author demonstrate originality.<sup>243</sup> This ensures that the author has imbued their work with expressive choices of their own.<sup>244</sup> There is little doubt that the work of authors involves innovation—often substantial innovation.

Markets for creative works behave in the way that Schumpeter observed markets in general behave.<sup>245</sup> Each work is a new product by virtue of its unique creative content, and authors are supply-side entrepreneurs who create new market demand based on innovations in their works. Those new works eventually form the "establishment," and newer creations push the envelope further. Each new creation recombines existing material in innovative ways to a lesser or greater degree. The innovative recombinations are, in economic terms, predictions about market needs and gaps. Successful entrants in the new generation of creations eventually "destroy" the older paradigm and ascend as vanguards of a new paradigm.

This epitomizes the history of the creative industries. Thus, the market for music or movies looks radically different in 2021 than it did in 1951. Early rock and roll at that time undermined the market for then-popular styles such as swing, rhythm and blues, and country and western. In the ensuing decades, countless new genres of rock and other forms of popular music emerged to undermine the market for the musical styles of each previous decade. All these new genres created new market demand, creatively destroying market demand for preceding genres.<sup>246</sup>

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242. DERESIEWICZ, *supra* note 14, at 75.

243. 17 U.S.C. § 102(a) (2018).

244. *See* Bleistein v. Donaldson Lithographing Company, 188 U.S. 239, 250 (1903); Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc., 499 U.S. 340, 358–59 (1991).

245. *See* Ariel Katz, *Substitution and Schumpeterian Effects over the Life Cycle of Copyrighted Works*, 49 JURIMETRICS J. 113, 122–26 (2009).

246. *See id.* at 122–23.

Although most works are just incrementally innovative, radical innovation by individual authors routinely punctuates the evolving market for creative works. The seminal English rock band Black Sabbath, for example, observed that there was a market for horror and occult-themed movies, but no bands at the time satisfied a latent, niche-market demand: rock music that tapped into the same emotions as horror films.<sup>247</sup> The band set out to combine existing elements—blues rock and the doom-ridden, macabre themes of horror films—to create a new sound.<sup>248</sup> They are widely credited with creating heavy metal, a new musical genre that has since been populated by thousands of other bands, many of which have innovated further subgenres. In the literature world, J.R.R. Tolkien combined elements from Anglo-Saxon, Celtic, and Norse mythology in highly innovative fashion to create *The Hobbit* and the *Lord of the Rings* trilogy, which helped define the fantasy fiction genre.<sup>249</sup> *Star Wars* is an example of a film that combined many preexisting elements into a genre-creating work.<sup>250</sup> There are of course many similar examples.

### C. AUTHORS ARE OFTEN COMMERCIAL ACTORS

While the innovative capacity of authors is evident, innovation alone, as noted in Part IV, is not sufficient to classify one as an entrepreneur as opposed to a mere thinker or inventor. Commercialization—bringing the product to market—is also key to entrepreneurship. Here too, many authors fit the bill. To activate the latent value in their work, creators typically must treat the work in a manner akin to how a business owner grows a startup venture: promote it, develop it, pound the pavement, and find investors and business partners to maximize the work’s reach and commercial viability.

Many authors today take on the bulk of commercialization themselves.<sup>251</sup> “YouTubers” and “TikTokers” create their own content, publish it online, and promote it through social media and other outlets.<sup>252</sup> Some musicians handle all the publishing and marketing of their songs and recordings.<sup>253</sup> My father

247. See MICK WALL, BLACK SABBATH: SYMPTOM OF THE UNIVERSE 40–44 (2013).

248. *Id.*

249. See TOM SHIPPEY, THE ROAD TO MIDDLE EARTH: HOW J.R.R. TOLKIEN CREATED A NEW MYTHOLOGY (2014).

250. See Forrest Wickman, *Star Wars Is a Post-Modern Masterpiece*, SLATE.COM (Dec. 13, 2015), [http://www.slate.com/articles/arts/cover\\_story/2015/12/star\\_wars\\_is\\_a\\_pastiche\\_how\\_george\\_lucas\\_combined\\_flash\\_gordon\\_westerns.html](http://www.slate.com/articles/arts/cover_story/2015/12/star_wars_is_a_pastiche_how_george_lucas_combined_flash_gordon_westerns.html).

251. See DERESIEWICZ, *supra* note 14, at 68–84.

252. See generally Sara Pereira, Pedro Moura & Joana Fillol, *The YouTubers Phenomenon: What Makes YouTube Stars So Popular for Young People*, 17 FONSECA J. COMM. 107, 108–11 (2018).

253. See Ari Herstand, *How Ten Musicians Make Good Livings in Today’s Music Industry*, DIGIT. MUSIC NEWS (Dec. 23, 2013), <https://www.digitalmusicnews.com/2013/12/23/full-time-musicians/>.

wrote a four-novel fantasy series, self-published and self-publicized it, and traversed the upper Midwest for years doing book signings and interviews.<sup>254</sup>

But entrepreneurs need not do it all themselves. The entrepreneur's job is not to excel at everything; it is to marshal their networks and resources to bring their innovations to market.<sup>255</sup> Thus, the novel writer will use their social and professional networks to locate an agent, a publicist, a publisher, and so on. A songwriter often works with a music publisher to provide capital advances and to handle the business affairs associated with the work's publication. A filmmaker signs deals with investors and distributors, hires publicists, and so on, to bring their work to market.

What about authors who do not aim to commercialize their works? Some people create for purely cathartic reasons—true Kafkas with no aim to disseminate. Under my approach, unlike the strict utilitarian view, we do not consider the author's intrinsic motivations. If they bear risk—including opportunity costs—and innovate, that is sufficient to justify the right.<sup>256</sup> Of course, any author is free to release their work with as few restrictions as they wish or to not commercialize or release their work at all.

## **VI. DO DIFFERENCES BETWEEN COPYRIGHT AND ENTREPRENEURIAL PROPERTY RIGHTS UNDERMINE THE AUTHORSHIP-ENTREPRENEURSHIP ANALOGY?**

One may be predisposed to dismiss the comparison between authors and entrepreneurs because copyright's exclusive property right distorts the market away from the competitive norm. Absent an intellectual property right, entrepreneurs may copy any business model or innovation that competitors introduce. Absent copyright, the same would be true for creators. A painter's personal property right in their canvas could prevent a competitor from stealing the canvas—a chattel—to which the painter's work is applied. But that property right would not prevent a competing artist from viewing the artwork and copying it onto a canvas of their own. Copyright goes the extra step of enabling the painter-author to protect the work itself, thereby protecting the

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254. JAMES D. PRIEST, *THE SPELL OF NO'AN: BOOK I OF THE KIRINS TRILOGY* (1990); JAMES D. PRIEST, *THE FLIGHT OF THE AIN: BOOK II OF THE KIRINS TRILOGY* (1992); JAMES D. PRIEST, *THE SECRET OF THE HANGING STONES: BOOK III OF THE KIRINS TRILOGY* (1993); JAMES PRIEST, *THE SEER OF SERONE* (2018).

255. See Leyden & Link, *supra* note 10, at 481.

256. This, of course, is different from the technical requirements for copyrightability. See 17 U.S.C. § 102(a) (2018) (requiring an original work of authorship fixed in a tangible medium of expression).

author's intellectual contribution. Copyright is therefore viewed as state intervention in free markets on authors' behalf.<sup>257</sup>

Copyright is not, however, a benefaction bestowed on authors. Because the initial production of information goods involves substantial sunk costs, but the goods are easily copied by competitors once released, market failure results unless there is intervention. Thus, copyright is a market corrective. Since authors start out in an economically disadvantaged position due to the nature of information goods, copyright puts authors in *equipoise* with entrepreneurs of rivalrous goods and services. Entrepreneurs dealing in physical goods and services need not worry that their goods or services will be appropriated, because their goods are rivalrous (they can only be used by one person at a time), excludable, and protected by property rights in the chattels or labor produced. Thus, competitors may be able to copy your business model and make and sell goods identical to yours that *they* produce, but they cannot sell the goods that *you* produce. Authors, on the other hand, do not produce books, CDs, Blu-Ray discs or other physical goods; the “goods” that authors produce are intellectual works. Therefore, in the absence of copyright, competitors *can* sell the very goods that authors produce. Without copyright's corrective mechanism, creators and intermediaries may be unable to recoup their sunk costs and may therefore refrain from bearing the commercial risks involved in production; information goods may therefore be underproduced to society's detriment.<sup>258</sup>

Since copyright is a corrective, copyright rights differ from the property rights of entrepreneurs in physical goods and services in two ways that are important for this discussion. First, because copyright is attached not to physical resources but to intangibles, information goods producers can enjoy advantages of scale that producers of physical goods or labor cannot. Second, copyright prevents competitors from making identical or “substantially similar” copies of the “good” (the copyrighted work).<sup>259</sup> This leads, at least in theory, to static costs: the exclusive rights that copyright confers (only the copyright owner can supply copies of the work) theoretically enables supracompetitive, monopoly pricing. It also leads to dynamic costs: it erects legal barriers to information access and puts limits on how much of a work follow-on creators may incorporate into new works. But, as is argued below,

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257. See Mark A. Lemley, *What's Different About Intellectual Property*, 83 TEX. L. REV. 1097, 1099 (2005); Bell, *supra* note 11, at 6.

258. See Lemley, *supra* note 11, at 1055; Stan Liebowitz, *The Case for Copyright*, 24 GEO. MASON L. REV. 907, 914–18 (2017) (hereinafter Liebowitz, *The Case for Copyright*).

259. See *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 765–66 (2d Cir. 1991).

none of these differences are fatal to the analogy between authors and entrepreneurs.

A. ENTREPRENEURIAL BUSINESS MODELS ARE INCREASINGLY  
DIGITAL-INFORMATION-BASED AND NEAR-ZERO MARGINAL COST

Authors have been distinguished from other economic actors because nonrivalrous information goods are not tied to exhaustible physical resources.<sup>260</sup> This means that authors enjoy advantages of scale that other entrepreneurs supposedly do not. An entrepreneur who makes donuts is naturally limited in what they can earn by the constraints of time, physical resources (like equipment and ingredients), and labor. Copyrighted works, as nonrivalrous intangible goods, are inexhaustible and potentially limitless. Thus, copyright in theory confers disproportionate rewards on authors for their limited up-front investment.<sup>261</sup> In addition, market prices serve to efficiently allocate scarce, rivalrous goods or services among consumers according to their willingness to pay.<sup>262</sup> Prices do not serve this purpose in the context of intangible works, however, since the marginal cost to produce an additional copy of the work for consumption is (in the digital age) essentially zero and there is no scarce resource to allocate.<sup>263</sup>

Whatever merit these arguments distinguishing authors from entrepreneurs may have had in the twentieth century, the digital information economy renders them obsolete. The most successful entrepreneurs of the new millennium make their fortunes by building digital platforms capable of limitless scale, unbounded by physical limitations or rivalrousness.<sup>264</sup> Platforms that eliminate the marginal cost of production and harness the potent combination of digitized information and network effects “are the natural business model of the Internet: They are pure zero-marginal-cost information businesses.”<sup>265</sup> Economist John Quiggen observes:

[T]here is very little relationship between the [cost] of information and the ability of corporations to capture value from it. . . . Without [freely available, nonrivalrous information], Google would be worthless. But because

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260. See LUNNEY, *supra* note 3, at 198 & n.6.

261. See *id.*

262. See Liebowitz, *The Case for Copyright*, *supra* note 258, at 914–15.

263. See *id.*

264. See LaFrance, *supra* note 20 (observing that Facebook’s digital platform architecture both enables it and incentivizes it to achieve “megascalse,” with 2.7 billion monthly users currently).

265. MOAZED & JOHNSON, *supra* note 20, at 87.

advertising can be attached to search results, ownership of a search engine is immensely profitable.<sup>266</sup>

The objection that authors and entrepreneurs are fundamentally different because the entrepreneur's prices efficiently allocate scarce physical resources, and their property rights and the income they generate are limited by rivalrous things in physical space, is a hollow anachronism.

B. COPYRIGHT'S STATIC INEFFICIENCIES: ALLOCATIVE EFFICIENCY AND MONOPOLY PRICING

Copyright rights are believed to put authors in a supracompetitive position because they empower authors to raise prices to supramarginal levels, which in theory encourages rent-seeking. In other words, by eliminating direct competition, copyright theoretically enables copyright owners to seek monopoly rents.<sup>267</sup> However, if markets for copyrighted works do not deviate to an unreasonable extent from the competitive norm, then a major economic argument against treating authors as entrepreneurs loses force.<sup>268</sup>

There is a long history of rhetorical references to copyright as a monopoly.<sup>269</sup> As Christopher Yoo observes, "Copyright scholars have consistently raised the concern . . . that the exclusivity granted by copyright gives rise to the familiar welfare losses associated with monopoly pricing."<sup>270</sup> As the next Section argues, the concern that copyright leads to monopoly rents is greatly overstated because copyright does not confer monopolies. Both economic theory and the limited available empirics on the subject support this conclusion.<sup>271</sup>

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266. Quiggen, *supra* note 20.

267. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700–02 (1988); Ku, *supra* note 52, at 318–19.

268. See Lemley, *supra* note 11, at 1059.

269. See, e.g., Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 170–71 (1934); WILLIAM F. PATRY, MORAL PANICS AND THE COPYRIGHT WARS 37 (2009) (quoting Lord Macaulay's 1841 reference to copyright as a monopoly); BOLDRIN & LEVINE, *supra* note 13.

270. Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. Rev. 212, 215 & n.6 (2004).

271. The point here is not to provide a general economic defense of copyright. For that task, see, for example, Stan Liebowitz, *The Case for Copyright*, *supra* note 258. My point is, more narrowly, that if markets for copyrighted works do not deviate unreasonably from the competitive norm, or if copyright does not lead to substantially more deadweight loss than copyright alternatives, an argument for treating authorial income differently from that of other entrepreneurs falls away.

### 1. *Copyrights Are Not Monopolies*

Monopolies are inefficient because their market power enables them to produce significant deadweight loss by driving up prices and reducing output to earn supracompetitive profits.<sup>272</sup> An economic monopoly exists when a market has a single seller.<sup>273</sup> The key requirement for economic monopoly is that there be no direct substitute for the monopolized good in the particular market.<sup>274</sup>

The market power that copyright confers is substantially different from an economic monopoly.<sup>275</sup> Although copyright affords exclusive property rights over an information good, it does not afford exclusive rights over the entire market for goods of that type. Thus, a copyrighted spy thriller novel does not confer a monopoly over all spy thriller novels. Copyright, like all property rights, confers a nominal monopoly—a property right over the particular thing (in this case, a copyrighted work)—but not an economic monopoly—the ability to control an entire market.<sup>276</sup> There is no real market power because copyrighted works are largely fungible.<sup>277</sup> If a publisher charges too much for a book, rival publishers will undercut it with similar books, and readers will readily defect. In other words, some consumers do find cut-rate alternatives to marquee titles to be satisfactory substitutes.<sup>278</sup>

The fact that competitors have to differentiate their products because copyright does not permit them to produce identical substitutes helps prevent copyright from conferring monopoly pricing power.<sup>279</sup> The differences that new market entrants' offerings bring gives those entrants a competitive foothold and prevents any one player from gaining too much market power.<sup>280</sup> For example, Harry Potter books are popular within the fantasy novel genre, but many readers prefer to read other fantasy novels in addition to or instead

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272. See PAUL KRUGMAN & ROBIN WELLS, *ECONOMICS* 371 (2d ed. 2009).

273. *Id.*

274. See Stan J. Liebowitz, *A Critique of Copyright Criticisms*, 22 *GEO. MASON L. REV.* 943, 946 (2015).

275. See Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 *VAND. L. REV.* 1727, 1729–30 (2000).

276. Liebowitz, *supra* note 274, at 946.

277. *Id.* at 948.

278. See DERESIEWICZ, *supra* note 14, at 164 (describing how in recent years independent authors have captured up to one-third of the adult genre fiction market because “[i]t turns out that a lot of people . . . would rather spend \$2 for a bad fake [John] Grisham novel than \$10 for real Grisham”).

279. See Yoo, *supra* note 270, at 248–51.

280. *Id.* at 248.

of Harry Potter novels. Product differentiation promotes competition and reduces monopoly.<sup>281</sup>

Some works do attract extraordinary consumer demand. Legions of Stephen King fans might not consider there to be good substitutes for Stephen King's novels. However, if Stephen King can earn monopoly rents from his famous horror novels, it is not because copyright has conferred an economic monopoly. Rather, if he enjoys higher rents in the horror novel market than other novelists, it is because of his unique talents that attract readers.<sup>282</sup> In other words, some properties are more valuable and may command higher market prices than other properties; this is as true for copyrighted works as for land and other forms of property. But the higher value does not convert the right into a monopoly. Copyright unlocks higher rents for creative individuals who have rare talent, just as ownership of a house at the most desired location in town unlocks that property's greater value for the owner.<sup>283</sup> "Copyright does not, by itself, however, provide an economic monopoly, just as ownership over [a house in a desirable location does] not provide a monopoly in the housing market."<sup>284</sup> Yoo calls this "imperfect competition"—copyrights confer market power that limits competition for a particular valuable title, but that does not mean the copyright owner can generate supracompetitive rents, since as noted, reasonably close substitutes can freely enter the market.<sup>285</sup> As the next Section discusses, the available empirical evidence casts doubt on the notion that copyright owners usually extract monopoly rents.

## 2. *Empirical Evidence of Monopoly Deadweight Loss on the Consumption Side of the Market*

Given its central importance to copyright theory, the question of copyright's effect on prices of information goods is surprisingly understudied. Nevertheless, the limited evidence that exists does not point to widespread monopoly deadweight loss on the consumption side of the market, although one possible exception is academic publishing, which is discussed separately in Section VII.D.1.

In his 2009 article *The Myth of Copyright Inefficiency*, Stan Liebowitz specifically tested the effect of copyright on prices by comparing list prices for current editions of bestselling copyrighted and public domain print books first

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281. *Id.*

282. *See* Liebowitz, *supra* note 274, at 947–48.

283. *Id.*

284. *Id.* at 948.

285. *See* Yoo, *supra* note 270, at 250.

published between 1895 and 1940.<sup>286</sup> Due to present copyright term lengths, the subset of books published before 1923 are in the public domain. He found “no clear evidence that copyright increases the price of books.”<sup>287</sup> Depending on how the results were weighted, Liebowitz found copyright’s effect on price (i.e., the supramarginal increase) ranged from zero to 14.5%—the higher number resulting when he weighted titles by raw sales numbers, suggesting copyright might increase the price of especially popular books.<sup>288</sup> Because authors of books receive royalties of up to 15%, he infers those economic rents may be mainly going to authors and that “the deadweight loss caused by the higher-priced copyrighted works was likely to be no more than a few percentage points of industry revenues.”<sup>289</sup>

In a 2008 study focused primarily on whether public domain status causes books to suffer from underexploitation, Paul Heald collected sales data, including prices, for bestselling novels published between 1913 and 1932.<sup>290</sup> Heald found (similarly to Liebowitz) that for most books in his sample copyright did not increase the price: “Interestingly, the average lowest list price per book . . . was exactly the same (\$20) for both the 125 copyrighted bestsellers still in print in 2006 and the 162 public domain bestsellers in print in 2006.”<sup>291</sup> But he found copyright likely affected prices for a subset of forty books that remain especially popular, twenty under copyright and twenty in the public domain (these are the literary equivalent of the most valuable real estate in town).<sup>292</sup> He found prices for the copyrighted works in this durable

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286. Stan J. Liebowitz, *The Myth of Copyright Inefficiency*, 32 REG. 28, 33 (2009) [hereinafter Liebowitz, *Myth of Copyright Inefficiency*].

287. *Id.* at 34.

288. *Id.* at 32 (“When titles are treated as equal but title variants are weighted by sales, the positive copyright coefficient is very modest and statistically insignificant. But when titles are weighted by raw sales, allowing the effect of some titles to dwarf that of others, the results indicate more strongly that copyright increases price and the result is statistically significant. This latter result would seem to imply that the effect of copyright on price depends on the size of the market for the title and that minor titles are less likely to experience price declines when copyright is removed.”).

289. *Id.* at 33–34.

290. Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031 (2008) [hereinafter Heald, *Property Rights*]. In a related study, Heald examined the access question along a different dimension—availability (rather than pricing) of copyrighted versus public domain books. He found that copyright “correlates significantly with the disappearance of [books] rather than with their availability.” Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 830 (2014) [hereinafter Heald, *How Copyright Keeps Works Disappeared*].

291. Heald, *Property Rights*, *supra* note 290, at 1043.

292. *See supra* notes 283–284 and accompanying text.

subset were as much as 41% higher than comparable public domain works for editions by well-known publishers and up to 55% higher when referencing the lowest-price edition by any publisher on Amazon.<sup>293</sup> A 2018 study by Xing Li, Megan MacGarvie, and Petra Moser tested the effect of an early nineteenth-century copyright term extension on book pricing in the United Kingdom at the time.<sup>294</sup> They found that copyright increased the price of books by an average of 37%, although as the copyright term neared its end, publishers lowered book prices by 15% on average.<sup>295</sup> The authors note the 15% decline might be an underestimate because titles that remain in print for the entire term are especially durable and may sell for a higher price.<sup>296</sup>

Together these studies, although not conclusive, suggest copyright may increase prices of some books (as one would expect) but not excessively—in the range of 15–55%. Importantly, most of the price increase appears concentrated in a small subset of very popular books. This result makes sense, since most books are commercial failures.<sup>297</sup> Publishers diversify their risk by owning large portfolios of works in which a few “hits” cover the losses generated by the rest of the catalog.<sup>298</sup> Classics—or “backlist” titles—are

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293. Heald, *Property Rights*, *supra* note 290, at 1048. Heald derives the 41% figure by comparing books sold by well-known publishers only. *Id.* However, when comparing the average lowest prices for the same works listed in the online database Bowker’s *Books in Print* (which includes small and on-demand publishers), he finds a considerably higher increase in average price—81%—for copyrighted books in the sample. *Id.* The price difference, Heald acknowledges, may not be entirely attributable to copyright, and may result from higher quality (and thus more expensive) materials. *Id.* To control for this, Heald also compares the prices of public domain and copyrighted works in the Penguin Classics series, finding an average price increase of 56% for copyrighted works, “almost exactly the difference in price for the twenty durable public domain and twenty durable copyrighted books found on Amazon.com (55%).” *Id.* at 1049. It is reasonable to focus on the 41–56% range in Heald’s study and treat the 81% figure as an outlier because comparisons between like editions are more meaningful and because of possible data issues in the *Books in Print* online database from which the 81% figure was derived. *See* Stan J. Liebowitz, *Is the Copyright Monopoly a Best-Selling Fiction* 8 (2008) (discussing data issues with the *Books in Print* online database as compared with the hardcopy version). One personal anecdote illustrates the problems with comparing cut-rate and high-quality editions. I recently ordered for my son the cheapest hard copy edition of Dickens’s *Great Expectations*—clearly in the public domain—available on Amazon. The cost was \$5. The copy we received condensed the typically-five-hundred-page novel into one hundred pages with the font size correspondingly reduced by 80%, rendering it virtually illegible. Few consumers would find a cut-rate edition with microscopic print to be reasonably equivalent to a typical edition of even average quality.

294. Xing Li, Megan MacGarvie & Petra Moser, *Dead Poets’ Property—How Does Copyright Influence Price?*, 49 RAND J. ECON. 181 (2018).

295. *Id.* at 183.

296. *Id.* at 199.

297. Barnett, *supra* note 62, at 398–99, 401.

298. *Id.*

especially important to this strategy as they “deliver[] a reliable income stream that can be used to fund new creative projects, cultivate related projects inspired by classic releases and offset the losses on new unrelated projects.”<sup>299</sup> It is unsurprising if publishers increase prices of the most popular works to improve the likelihood of a positive aggregate return and ensure sufficient revenue to invest in the next generation of books. As discussed below, however, copyright owners often maximize profits on popular works by increasing availability rather than price.

Any effect of copyright on deadweight losses must also be contextualized against alternatives to the copyright system. For example, if we were to replace copyright with a compulsory licensing regime for the digital distribution of works,<sup>300</sup> we would still have to assume administrative overhead costs (one compulsory licensing proposal assumes overhead of 20%).<sup>301</sup> There are also bound to be significant additional deadweight losses arising from such a system beyond the basic costs of administering it.<sup>302</sup> So, it is far from clear that alternative creator remuneration models would be more efficient than copyright.

Moreover, looking at unit-based sales data for vintage hardcopy titles, as the aforementioned studies do, seems anachronistic at a time when all-you-can-eat digital content subscription services are eclipsing physical copy sales for many types of copyrighted works. Content subscription pricing demonstrates a clear trend toward unity pricing between public domain and copyrighted works. For subscribers of such services, the price per unit of consumption is perfectly uniform across all works, regardless of the work’s popularity or whether or not they are protected or in the public domain. For example, at the time of this writing, a music fan can access a catalog of more than seventy million recordings for \$10 per month via a subscription to Spotify or Apple Music, the two most popular music streaming subscription services

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299. *Id.* at 408.

300. *See, e.g.*, WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199–258 (2004). Fisher’s proposal would establish a compulsory licensing system enabling internet users to copy and distribute copyrighted works online without restriction in exchange for a tax on their broadband fees; the tax proceeds less an administration fee would be distributed proportionally to participating copyright owners based on usage tracking data. *Id.*

301. *Id.* at 214; *see also* Liebowitz, *Myth of Copyright Inefficiency*, *supra* note 286, at 34.

302. Liebowitz, *Myth of Copyright Inefficiency*, *supra* note 286, at 34; John F. Duffy, *The Marginal Cost Controversy in Intellectual Property*, U. CHI. L. REV. 37, 44–45, 51 (2004).

in the United States.<sup>303</sup> Because subscribers pay a flat fee, the “price” they pay to consume copyrighted compositions by contemporary composer John Adams and public domain Beethoven symphonies is identical. Similar subscription services have proliferated across the spectrum of copyrighted works from books (Kindle Unlimited and Scribd) to movies and television (Netflix, Hulu, Disney Plus, HBO Max, and Apple TV+) to video games (including offerings from Apple, Microsoft, and Electronic Arts). By this measure, copyright has no effect on pricing—the cost of consumption of a public domain work and a copyrighted work are identical. Of course, copyright does affect pricing in the sense that subscription services might be cheaper if authors and copyright owners were paid nothing. But given the substantial sunk costs involved in producing high-quality works, comparing present pricing to a world in which all content acquisition costs are zero is unreasonable. The point for present purposes is that the limited available evidence does not demonstrate that copyright markets are unreasonably inefficient.

It may seem paradoxical that copyright imposes comparatively little deadweight loss on consumers despite that its purpose is to afford copyright owners pricing power.<sup>304</sup> The paradox is explained by the fact that, as discussed above, copyright simply does not confer *monopoly* pricing power.<sup>305</sup> In addition, although copyright owners may modestly increase prices of the most popular works, at least in the context of legacy print books as discussed above, they more typically capture the greater market value of popular works by amortizing fixed costs over a larger output.<sup>306</sup> That is, copyright owners increase access (more copies printed, more movie screens devoted to a release at the cineplex, more digital streams furnished, and so on) to satisfy demand rather than price the most in-demand works significantly higher than other works.<sup>307</sup> This results in general uniformity of prices within the same market, meaning that blockbuster works are often priced in the same range as less popular works, and deadweight loss is decreased.

Pricing practices can differ by sector in the copyright industries. Pricing of mass-market copyrighted works, which are the bulk of commercially produced

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303. See Lexy Savvides & Vanessa Hand Orellana, *Apple Music vs. Spotify: The Best Music Streaming Service for You*, CNET.COM (May 18, 2021), <https://www.cnet.com/news/apple-music-versus-spotify-best-music-podcasts-streaming-service-price-catalog-features-plans-compared/>.

304. Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1854 (2014).

305. See *supra* Section VI.B.1.

306. Liebowitz, *Myth of Copyright Inefficiency*, *supra* note 286, at 34.

307. *Id.* at 33.

works, generally follows the patterns described above. However, specialized markets for academic or professional works may have unique characteristics that can indeed engender the kind of monopoly pricing power and deadweight loss that animates concerns about copyright. As Section VII.D.1 discusses, this does not necessarily undermine this Article's thesis because a risk bearing plus innovation conception of copyright incentives could justify significantly limiting or denying protection to such works.

### C. COPYRIGHT'S DYNAMIC INEFFICIENCIES: CHILLING EFFECTS AND FOLLOW-ON CREATIVITY

Employing copyright as a corrective for market failure also imposes serious dynamic costs, most notably limitations on public access to the work and chilling effects on follow-on creativity.<sup>308</sup> These costs are well recognized.<sup>309</sup> The stronger and broader the copyright rights, the greater these dynamic costs become. If copyright owners enjoy near-absolute control over the dissemination and creative use of their works, consumers' ability to view, borrow, lend, and resell copyrighted works would be severely limited, reducing social welfare by obstructing the diffusion of knowledge. Follow-on creativity would be similarly diminished. By restricting the inputs for new information goods, fewer new works will be produced, and those that are produced will be more culturally and intellectually impoverished. Of course, in that case, the costs would exceed the intended benefits of the system and result in social waste.

The well-known dynamic inefficiencies copyright engenders are concededly where the analogy between authors and entrepreneurs is most problematic. This is not only because copyright is state intervention into competitive markets on authors' behalf, but also because information and cultural goods are a special class of product that fuels progress: they are the lifeblood of education, culture, art, knowledge, intellectual and democratic discourse, and entertainment. Therefore, the debates around the scope of copyright are both impassioned and important. People who care about the production, dissemination, and use of knowledge want to get the balance right.

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308. Other perceived costs include reducing cultural diversity by encouraging content industries to focus on a smaller number of blockbuster works promoting "commodity culture," discouraging production of works of interest to underrepresented groups, and encouraging copyright industry concentration. See Sean A. Pager, *Does Copyright Help or Harm Cultural Diversity in the Digital Age?*, 32 *KRIKA KALTURA* 397, 400–02 (2019).

309. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 183–99 (2004) [hereinafter LESSIG, *FREE CULTURE*]; see also *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J. dissenting).

Nevertheless, the special dynamic costs engendered by copyright do not invalidate the analogy between authors and entrepreneurs. Recall that because of the nonrival nature of information goods, authors start out in a disadvantaged commercial footing as compared with entrepreneurs of rivalrous goods and services.<sup>310</sup> Copyright is a corrective. The key to minimizing costs is to avoid *overcorrection*. How much and in what contexts we are overcorrecting and undercorrecting (since in a complex system there are doubtless inefficiencies on both sides of the line) and where tailoring is needed are ultimately empirical questions, albeit extremely difficult ones.<sup>311</sup> But for present purposes, so long as the system's dynamic costs are managed within reasonable tolerance levels, the notion that dynamic costs necessitate sweeping caps on authorial income loses force.<sup>312</sup>

Copyright law is in fact highly attuned to the problem of overcorrection. As former Register of Copyrights Ralph Oman notes, "The idea that some restraints on the market for copyrighted works are appropriate is as old as statutory copyright itself."<sup>313</sup> The law is filled with exceptions and defenses both broad and specialized, including the idea-expression distinction, originality and uncopyrightability of facts, fair use, compulsory licenses, and many other exemptions and defenses.<sup>314</sup> These are designed to mitigate

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310. See *supra* notes 257–258 and accompanying text.

311. See Lemley, *supra* note 11, at 1066.

312. See LUNNEY, *supra* note 3, at 198–99.

313. Ralph Oman, *The Compulsory Licensing Redux: Will It Survive in a Changing Marketplace?*, 5 CARDOZO ARTS & ENT. L.J. 37, 38 (1986).

314. The Copyright Act "has a swiss-cheese structure" because it devotes just one section to the grant of rights (§ 106) followed by sixteen sections detailing defenses and express limitations and exceptions to the § 106 rights, not to mention other judicially created defenses and exceptions. Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 165 (2019). Important limitations on copyright rights include the related doctrines of idea/expression distinction, merger, originality, and the non-protectability of facts and functional matter, which together ensure that ideas, concepts, facts, theories, themes, motifs, incidents of genre, and functional features of objects always remain in the public domain for use by future creators. See 17 U.S.C. § 102(a)–(b) (2018); *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 347–49 (1991). Additionally, Congress's decision to omit a right to "use" a work from the copyright owner's statutory rights ensures that consumers who have access to a copy of the work through libraries, galleries, bookstores, friends, and so on can read, view, and listen without limitation. 17 U.S.C. § 106 (2018) (enumerating the rights encompassed by copyright). The "first sale" doctrine exhausts the copyright owner's right to control resale markets for copies of their works. 17 U.S.C. § 109(a) (2018). Numerous compulsory licenses in the Copyright Act resulted from compromises designed to balance creators' right to compensation with content users' need for affordable access. See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1925–27 (1990); Oman, *supra* note 313, at 37. Section 512 exempts internet

copyright's dynamic inefficiencies. By limiting the scope of rights, they already limit what copyright owners can earn, and intentionally so given the unique characteristics and importance of information goods. We are a very long way from the kind of suffocating copyright system Professor Lemley worries about that would “permit [creators] to capture the full social value of their invention.”<sup>315</sup>

The present situation regarding copyright's dynamic inefficiencies appears to be considerably more sanguine than the direr forecasts at the turn of the century.<sup>316</sup> Especially regarding the question of whether creativity is stifled, whatever friction copyright introduces into the production of new works hardly seems excessive. Although we will never know what works did not get created because of concerns about copyright infringement, we do know about the creative works that *are* made, and the numbers are gobsmacking. We are in the most prolific creative age in history, at least measured by volume. Over five hundred hours of video are uploaded to YouTube *every minute*.<sup>317</sup> Sixty thousand tracks are uploaded to Spotify every day, with a total of over seventy million tracks by eight million creators on the platform.<sup>318</sup> And the numbers

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service providers from secondary liability in a number of circumstances, helping to facilitate the dissemination and sharing of information online. 17 U.S.C. § 512 (2018). In the event the aforementioned exemptions do not apply but equities or societal needs demand that the use be permitted, fair use is a powerful and flexible backstop that gives courts broad discretion to excuse the use. See Martin Senftleben, *The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions*, 33 AM. U. INT'L L. REV. 231, 238–40 (2017); 17 U.S.C. § 107 (2018) (setting forth the fair use limitation on exclusive rights). And, of course, the Constitution limits copyright terms—although many rightly wonder, given the length and frequency of term extensions, whether as a practical matter there really are term limits at all. See *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J. dissenting). Still, thousands of great works of literature, music, and art are in the public domain today because of a long-standing recognition of the importance of limits on copyright. These doctrines are not just statutory stopgaps (although some of them—such as some compulsory licenses—arguably are). They emanate from principles deeply embedded within the logic of copyright law and policy. See *supra* notes 155–157 and accompanying text.

315. Lemley, *supra* note 11, at 1032.

316. See, e.g., LESSIG, *FREE CULTURE*, *supra* note 309, at 183–99; JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 50–53 (2008); Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1, 1996), <https://www.wired.com/1996/01/white-paper/>; Ku, *supra* note 52, at 318–21; Eben Moglen, *The dotCommunist Manifesto* (Jan. 2003), <http://moglen.law.columbia.edu/publications/dcm.html>.

317. H. Tankovska, *Hours of Video Uploaded to YouTube Every Minute 2007–2019*, STATISTA, Jan. 26, 2021, at <https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/#statisticContainer>.

318. Tim Ingham, *Over 60,000 Tracks Are Now Uploaded to Spotify Every Day. That's Nearly One Per Second*, MUSIC BUS. WORLDWIDE (Feb. 24, 2021), <https://www.musicbusinessworldwide.com/over-60000-tracks-are-now-uploaded-to-spotify-daily-thats-nearly-one-per-second/>.

are only growing: Spotify CEO Daniel Ek estimates that by 2025 there will be as many as fifty million creators on the platform, with 137 million new tracks added every year.<sup>319</sup> Since 2008, more than seven million books have been self-published.<sup>320</sup> Based on one anecdotal data point—the huge volume of *Star Wars*, *Harry Potter*, and *Marvel Universe* spoofs, commentaries, mash-ups, and fan films on YouTube with millions of views—many in this tsunami of creative works build upon copyrighted works. Cultural remixing is thus apparently flourishing. And these figures do not include the explosion of new TV series, documentaries, and movies regularly released on video streaming services such as Netflix, Disney Plus, Apple TV+, and HBO Max, to name a few. Netflix alone has reportedly produced 1,500 original titles since 2013.<sup>321</sup> It seems the problem of incentivizing quantity is not the issue; rather, the key is incentivizing the kind of commercial risks involved in producing and disseminating high-quality content.

Of course, not all of copyright's dynamic costs are mitigated. Platforms such as YouTube still too frequently block obvious fair uses, such as videos that incorporate content for purposes of commentary and criticism.<sup>322</sup> One study deemed a concerningly high number of copyright owners' content takedown requests—roughly 30% or more—as “questionable” regarding their validity or identification of a likely infringement.<sup>323</sup> Long copyright terms mean that out-of-print works still covered by copyright “disappear” for decades.<sup>324</sup> “Orphan works”—protected works whose copyright owner cannot be determined or located—raise serious obstacles to use and digitization of older works.<sup>325</sup> Scholarly articles are overpriced and can be difficult to access.<sup>326</sup> Copyright's rents—and the financial comfort they provide to the most successful authors—might cause music superstars to be somewhat less

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319. *Id.*

320. DERESIEWICZ, *supra* note 14, at 57.

321. Sam Cook, *50+ Netflix Statistics & Facts that Define the Company's Dominance in 2021*, COMPARITECH.COM (Feb. 11, 2021), at <https://www.comparitech.com/blog/vpn-privacy/netflix-statistics-facts-figures/>.

322. See Eileen McDermott, *What's Fair? Senate IP Subcommittee Contemplates Problems with Copyright Fair Use Regime*, IP WATCHDOG (July 30, 2020), <https://www.ipwatchdog.com/2020/07/30/whats-fair-senate-ip-subcommittee-contemplates-problems-with-copyright-fair-use-regime/id=123614/> (noting Congressional testimony by YouTube creator and music commentator Rick Beato concerning takedown requests he receives for clearly fair uses of music in his video commentaries).

323. See JENNIFER URBAN & JOE KARAGANIS & BRIANNA SCHOFIELD, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 2–3 (2017).

324. See Heald, *How Copyright Keeps Works Disappeared*, *supra* note 290, at 829–30.

325. See David R. Hansen, Berkeley Digital Library Copyright Project White Paper #3, Orphan Works: Causes of the Problem (2012).

326. See *infra* Section VII.D.1.

productive (if indeed we consider that a meaningful cost, especially given the astonishingly large volume of music being produced today).<sup>327</sup> These and many others are costs imposed by copyright and highlight the ever-persistent need for tailoring. But in broad strokes, given the astounding volume of content created and readily accessible, urgent calls to single out authorial “overcompensation” for the sake of reducing copyright’s dynamic costs seem unjustified.<sup>328</sup>

The benchmark we use for measuring overcorrection and for tailoring the system matters enormously. When we measure according to an oversimplified “incentivizes creation” view of authorial incentives, copyright appears to be a massive overcorrection since many authors, even of commercially successful works, create for intrinsic reasons.<sup>329</sup> These authors’ works would still be created in the absence of copyright, to society’s benefit, but without the dynamic costs noted above. This leads some to conclude that, at best, copyright is justified to support some big-budget, mass entertainment products that would be prohibitively expensive to produce without it.<sup>330</sup> Outside of that, according to skeptics, copyrights are “legal fripperies” for authors.<sup>331</sup>

But that view does not provide us with a useful benchmark because, as discussed in Parts II and III, it overlooks the legions of middle-class creators who respond to intrinsic motivations but incur very significant costs and risks, as well as risk-bearing intermediaries that help bring marketable works to consumers. As noted, the risk is often even greater for the individual creator than for Big Media because the latter has the opportunity to diversify risk across a broad portfolio of works.<sup>332</sup> As Deresiewicz explains after interviewing over 140 independent musicians, filmmakers, writers and other artists, this middle class of creators are “mini-capitalists: people who produce and sell their works on the open market.”<sup>333</sup> The view that copyright is only meaningful to Big Media and is just a hindrance to independent creators is a caricature.<sup>334</sup> Over the past decade, independent creators from musicians to indie filmmakers to photographers and writers have increasingly shed light on

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327. See Lunney, *Copyright Lost*, *supra* note 13, at 208–11.

328. See Lemley, *supra* note 11, at 1058–65; Lunney, *supra* note 3, at 198–209; Lunney, *Copyright Lost*, *supra* note 13, at 208–11.

329. See *supra* notes 50–52 and accompanying text.

330. See *supra* notes 58–59 and accompanying text.

331. Bell, *supra* note 11, at 9.

332. See *supra* notes 139–140 and accompanying text.

333. DERESIEWICZ, *supra* note 14, at 310.

334. See, e.g., LESSIG, REMIX, *supra* note 57, at 291; RAUSTIALA & SPRIGMAN, *supra* note 52, at 150, 171; Ku, *supra* note 52, at 306–11.

copyright's important role in enabling them to maintain their craft and continue to take substantial risks.<sup>335</sup>

It is worth pointing out that having either no copyright system or a weak one imposes its own costs. I and others have studied China's creative ecosystem to learn what happens in the absence of effective copyright protection.<sup>336</sup> First, when the copyright system fails to enable creators to bear commercial risk, creators may forgo authorship for more stable income streams.<sup>337</sup> Liu concludes from his empirical study of Chinese songwriters, for example, that "the return from existing works determines how long musicians can continue to create music while making a decent living [and] how much musicians can invest in future music production."<sup>338</sup> Although it is impossible to know how many works do not get made because of weak copyright protection, it is notable that China's popular music output has been remarkably low. One China music industry insider estimates that the entire canon of popular Chinese music was still fewer than one million songs in 2020.<sup>339</sup> Historical and political factors have doubtless contributed to that low number, but poor copyright protection is nevertheless likely the main cause of low investment in music.<sup>340</sup>

Second, those intrepid creators who do try to eke out a living—I call them "copyright extremophiles" for surviving under extremely harsh economic conditions<sup>341</sup>—are reliant on one or two tenuous revenue streams usually controlled by a powerful intermediary that exploits copyright owners.<sup>342</sup> For example, China's mobile phone providers controlled the four-billion-dollar ring-back tone market in 2011 and used their leverage to keep 98% of the revenue for themselves.<sup>343</sup> With few meaningful alternative revenue streams,

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335. See, e.g., DERESIEWICZ, *supra* note 14, at 292–95; Silbey et al., *supra* note 162; Colin Cohen, *Zoe Keating Offers More Evidence That Spotify Royalties Are Declining*, DIGIT. MUSIC NEWS (Dec. 6, 2019), <https://www.digitalmusicnews.com/2019/12/06/zoe-keating-spotify-royalties-declining/> (noting the effect of low royalties for prominent musician); Kathy Wolfe, *Piracy Profiteers: Time to Walk the Plank*, HUFFPOST (Jan. 17, 2012), [https://www.huffpost.com/entry/piracy-profiteers-time-to\\_b\\_1210132](https://www.huffpost.com/entry/piracy-profiteers-time-to_b_1210132).

336. See Priest, *supra* note 109.

337. See Liu, *supra* note 233, at 523–25.

338. See *id.* at 533.

339. See Jones, *supra* note 112 (interviewing China music industry expert Ed Peto).

340. See Priest, *supra* note 109, at 523.

341. See *id.* at 470. Extremophiles are organisms that evolve to survive in extreme, usually uninhabitable, conditions. *What Is an Extremophile*, NAT'L OCEAN SERV., <https://oceanservice.noaa.gov/facts/extremophile.html> (Feb. 26, 2021).

342. See Priest, *supra* note 109, at 518–20.

343. See *id.* at 502.

copyright owners had scant leverage to push back.<sup>344</sup> So, it is far from clear that gutting or abolishing copyright, as some advocate, would result in pure welfare gains for consumers.<sup>345</sup> Rather, the data from China suggest that abolishing copyright would simply empower rent-seeking digital intermediaries.<sup>346</sup> But these intermediaries, unlike the culture industries, do not invest in bringing new works to market.

In short, the fact that copyright imposes unique dynamic costs is no reason to reject the comparison between authors and entrepreneurs. Indeed, the comparison provides us with more useful insights into how well the copyright system is working than does a simple utilitarian model of authorial incentives.

## VII. FURTHER THEORETICAL IMPLICATIONS

So far, I have endeavored to show that authors are entrepreneurs and that the arguments for differential treatment of authorial and entrepreneurial income are unpersuasive. Part III discussed the main theoretical implications of an entrepreneurship-influenced theory that views copyright as incentive and reward for risk bearing and innovation. This final Part notes some further theoretical implications of considering authors as entrepreneurs.

### A. COPYRIGHT OWNERSHIP IS ANALOGOUS TO EQUITY OWNERSHIP IN A VENTURE

If authors are entrepreneurs, it raises the practical question of what is an author's "venture." We might assume it is a standard business entity—a sole proprietorship, partnership, limited liability company, or corporation—organized with the author as a major (or sole) shareholder. Indeed, many authors conduct business through such entities, and film producers routinely create project-based limited liability companies or corporations to coordinate financing.<sup>347</sup> But the author's business entity does not capture the full economic reality of authorship. When an author creates a work, the author most directly invests not in an abstract business associated with the author but in the work itself.

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344. *See id.* at 514–20.

345. Lunney, *Copyright Lost*, *supra* note 13, at 211–12 (“The notion that copyright can serve the public interest by increasing revenue for copyright owners has, at least for the recording industry, proven false. . . . If only copyright would die.”).

346. Priest, *supra* note 109, at 534–39.

347. *See* Daniel J. Scott, *The Hollywood Grat Pack: Wealth Planning in the Entertainment Industry*, 25 ENT. & SPORTS LAW. 16, 16 (2007); Daniel M. Satorius, *Other People's Money: Financing the Low-Budget Independent Feature Film with Private Equity Securities Offerings*, 16 ENT. & SPORTS LAW. 11, 16 (1998).

Thus, every copyright associated with every work produced by an author is analogous to a discrete startup venture. Entrepreneurs invest their labor and capitalists invest their capital into business entities. Without an organizing form that formalizes the ownership structure and enables conversion of labor and capital to property ownership, the kind of entrepreneurship that drives our economy today would be difficult or impossible. Copyright creates an analogous legal structure that enables in-kind and financial investments into a work's value chain. The copyright is distinct from the work, which is distinct from copies of the work. The work is the intangible information good while copies are discrete physical renderings of the work. The copyright is something altogether different. It is a form of property that gives the owner the power to exclude others from certain conduct (some kinds of unauthorized copying and distribution, and so on). But copyright also provides a legal structure in which the author's innovative labor may be invested to accumulate value. Copyright provides a vehicle for investment in the work not only by authors but also by key channel partners who aid authors in commercialization, such as publishers.<sup>348</sup> In short, much like a business entity, copyright is a vessel for investment that provides a structure for securitization and stakeholder coordination.

If it sounds like a stretch that a copyright in a single work functions as an entity-like investment vehicle, then consider that there are "equity crowdfunding" services that enable fans to invest money directly into an equity stake in a song's copyright and earn a share of future royalties.<sup>349</sup> This model's proponents envision that music industry professionals and social media influencers might also trade in-kind investments such as promotional services instead of cash for an equity stake in an artist's copyright.<sup>350</sup> This represents the kind of disintermediation that makes today's authors even more similar to entrepreneurs than authors of previous generations. It is hard to imagine a more literal example of the author as an entrepreneur and their copyright as an investment vehicle.

A copyright is obviously not a business entity, so the analogy only goes so far. But the fact that there are differences between copyright and business entities' form and function does not invalidate the analogy. The core of the

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348. See *supra* Section III.B.

349. See Tim Ingham, *Would You Invest Your Own Money Into Your Favorite Artist's Music?*, ROLLING STONE (Aug. 19, 2019), <https://www.rollingstone.com/music/music-features/would-you-invest-your-own-money-into-your-favorite-artists-music-872744/>.

The purveyors of these services envision that, one day, equity crowdfunding will become the dominant model for advancing money to songwriters and musicians for a share of royalties, replacing a role record labels and music publishers have traditionally filled. *Id.*

350. *Id.*

analogy is that copyright provides a vehicle for investment with ownership-mapping properties, which is a critical function of a legal business entity. In both the business entity and copyright contexts, the existence of a formal structure to coordinate entitlements is critical to the creation and development of the venture and to ownership and distribution of the resulting profit. It is also worth noting that although corporations are theoretically perpetual, this analogy to business entities does not necessitate the conclusion that copyright should be perpetual. Despite several analogous functions, they are different kinds of property whose respective contours reflect the different social objectives and tradeoffs associated with each.

Julie Cohen similarly sees the corporate form as a useful conceptual model for understanding copyright law.<sup>351</sup> In Cohen's view, clinging to the flawed utilitarian incentive rationale for copyright "impedes clear-eyed assessment of copyright's true economic and cultural functions" in our contemporary information society, which are "to enable the provision of capital and organization so that creative work may be exploited."<sup>352</sup> Copyright functions as a set of coordinating principles and regulatory rules for the creative industries, prompting Cohen to classify copyright as a new species of property: "post-industrial property."<sup>353</sup> Cohen argues that copyright today is a direct descendant of industrial-era property—that is, corporate property—which evolved from pre-industrial (real) property to address the emerging needs of a new industrial age.<sup>354</sup> Corporate law enabled the accumulation of assets under a fictional form and instituted a formal means of separating ownership from control, subject to new rules that ensure management of commonly owned property remains accountable to other stakeholders.<sup>355</sup> Similar to corporate law, copyright law is "a modality for post-industrial resource coordination."<sup>356</sup> Copyright law thus functions as the "Delaware law of the post-industrial property system" for creative industries.<sup>357</sup>

Although Professor Cohen promises that her post-industrial property theory of copyright is "potentially far more attentive to the interests of authors than the name suggests,"<sup>358</sup> she struggles to articulate exactly where the author fits in her high-level vision of copyright as a system for coordinating creative

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351. Cohen, *supra* note 25, at 143.

352. *Id.* at 150.

353. *Id.*

354. *Id.* at 151.

355. *Id.*

356. *Id.* at 155.

357. *Id.* at 152.

358. *Id.* at 144.

industry resources.<sup>359</sup> Cohen maintains that authors have not disappeared from her account because one strength of the framework is that it foregrounds relational considerations between authors and creative intermediaries.<sup>360</sup> She argues that insights about authors can be gleaned from her model by analogizing them alternately to corporate shareholders and workers.<sup>361</sup> “Authors can be employees,” she writes, “and sometimes also can perform a role analogous to the shareholder’s role, as is the case for some collective-rights organizations.”<sup>362</sup> But the awkwardness of these analogies is readily apparent: Cohen classifies authors as a “third class” of stakeholder that “sometimes overlaps with” shareholders and workers.<sup>363</sup> Although it is not her intention, Cohen’s theory ultimately seems to marginalize the author as a stakeholder defined more by relationships than contributions, and it seems to provide insights about the author mainly in limited contexts such as collective rights management and rules regarding works made for hire and transfer termination rights.<sup>364</sup>

Cohen’s framework articulates well copyright’s complex, hybrid nature. Copyright is entity-like in the way it provides a formal cooperative structure for financing and stakeholder coordination while evincing core property characteristics including exclusivity, transferability, divisibility, and the ability to map assets to owners.<sup>365</sup> Cohen is correct that the utilitarian incentive theory is impoverished, and that copyright is best understood in part as a vehicle for coordinating investment and ownership between authors and stakeholders. Cohen also rightly emphasizes the highly complex copyright industry coordination problems for which copyright law has become the overarching regulatory regime and to which the overmatched utilitarian theory has little to contribute.<sup>366</sup>

However, Cohen’s corporate law framing falls short because it misses the most salient part of the analogy: that the author is an entrepreneur. From that basic realization, the theory’s other facets flow naturally. It becomes readily apparent why the corporate law analogy is apt: like any entrepreneur, the

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359. *See id.* at 155 (“The description of copyright as a modality for post-industrial resource coordination appears to pull copyright policy even more deeply into the realm of instrumentalism and to divorce it even farther from the personal interests of authors.”).

360. *Id.* at 160–64.

361. *Id.*

362. *Id.*

363. *Id.* at 160.

364. *See id.* at 161–62.

365. *Cf.* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements as Information*, 116 YALE L.J. 1 (2000); Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 909 (2014).

366. Cohen, *supra* note 25, at 154.

author requires a financing and ownership coordination device for investors and channel partners the author brings on board. An entrepreneurship framing restores the author's role as the principal figure in the copyright ecosystem, the catalyst whose innovation is the lifeblood of the creative industries. It foregrounds an important objective of copyright: the provision of authors' livelihoods.<sup>367</sup> It opens a new vista in understanding the nature, role of, and justifications for authorial income beyond narrow utilitarian incentives.<sup>368</sup> And it illuminates why Cohen's author-employee and author-shareholder analogies feel awkward and incomplete. The author-employee analogy is ill-fitting because the (independent contractor) author is no more an employee of the creative intermediary than an entrepreneur is an employee of an angel investor or venture capitalist. The author-shareholder analogy is ill-fitting because the entrepreneur is not just any shareholder, nor is the author. The author and the entrepreneur are the catalysts of the venture, initially the sole owners and controllers.<sup>369</sup> The work or venture is often stamped with their character. They often (though not always) retain a special relationship with the work and venture.<sup>370</sup> Lastly, authorial and entrepreneurial incomes are property-derived, unlike salaries or wages, because of these activities' speculative nature.

Moreover, it is not clear in Cohen's framework what exactly makes the author analogous to a shareholder—a shareholder of what? The entrepreneurship theory of copyright dispels any ambiguity: the copyright itself is the legal structure that enables accumulation of value through in-kind and financial contributions by the creator and external investors and delineates and partitions shares of that "equity." For Cohen, the corporate law-copyright analogy suggests that copyright is more of a regulatory regime than a property regime. Enriching the analogy with entrepreneurship theory reinvigorates property's central role in the narrative.

Another issue with Cohen's theory, focused as it is on providing a more accurate descriptive account and new framing, is that it seems ill-equipped to answer foundational questions such as why the author is entitled to a property right in the first place. Cohen raises the issue in passing while discussing the policy consequences of property framing, and it seems clear it is the kind of question her post-industrial property theory may have difficulty answering: "If

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367. *Cf.* Hughes & Merges, *supra* note 38, at 516 (invoking Rawlsian distributive justice to argue that providing for creators' livelihoods is an important objective of copyright and, by that standard, copyright law does better than most scholars believe).

368. *See supra* Part III.

369. *See* 17 U.S.C. § 201(a) (2018) ("Copyright in a work protected under this title vests initially in the author or authors of the work.").

370. True, the author like any entrepreneur can alienate their entire interest or (as Cohen notes) be divested of control.

we think that termination of transfers is the best way to put authors in a good bargaining position with respect to what is, *in some transcendent sense, rightfully theirs,* we may concentrate our energies on reforming termination rules . . . .”<sup>371</sup> Cohen suggests elsewhere in the article that there is synergy between her theory and author’s rights-personhood theories of copyright, but does little to develop it.<sup>372</sup> An author-as-entrepreneur framing helps in this regard. It ties authors’ property rights to risk bearing and innovation and, by restoring the author as the protagonist, creates more conspicuous synergies with author-centric copyright theories.<sup>373</sup> The following Section discusses in more detail the intersection between entrepreneurship theory and such deontological theories of copyright.

#### B. ENTREPRENEURSHIP THEORY AND NONCONSEQUENTIALIST COPYRIGHT THEORIES

Much of this Article discusses the contrast between an entrepreneurship-influenced copyright theory and utilitarian copyright theory. This Section considers how entrepreneurship theory interfaces with nonconsequentialist or deontological theories of copyright.

There are points of contact between the labor-desert theory, most closely associated with Locke, dignity-based theories of property associated with Kant and Hegel,<sup>374</sup> and the author-as-entrepreneur theory sketched here. In very simplified terms, Locke contends that labor spent acquiring or transforming resources held in common ought to be rewarded with a property right, limited by caveats designed to resolve tensions between private property rights and other social interests.<sup>375</sup> As Merges puts it, for Locke, the reward of a property right for labor “honors the effort involved and calls forth more of it.”<sup>376</sup> Kant, meanwhile, teaches that property rights are central to promoting dignity by maximizing individual freedom, choice, and autonomy. For Kant, the need for property arises because people require maximum freedom of action, which sometimes requires exerting control—and thus obtaining legal possession—over things. These “things” may be tangible or intangible; “all property rights,”

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371. Cohen, *supra* note 25, at 162 (emphasis added).

372. *Id.* at 155.

373. *See infra* Section VII.B.

374. *See* Justin Hughes, *Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 299–330 (1988); MERGES, *supra* note 33; *see also* Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1949–74 (2006) (elaborating on dignity-oriented justifications for copyright by exploring spiritual and theological dimensions of creativity).

375. *See* MERGES, *supra* note 33, at 38.

376. *Id.*

as Merges puts it, “have [an] element of artifice, because they define a conceptual type of possession.”<sup>377</sup> The freedom of action that property rights engender is central to autonomy—the capacity for “self-rule” and implementation of one’s own life plan.<sup>378</sup> For creators, Merges argues, autonomy requires an enforceable, market-making right that gives them a fair shot at earning a living through their creative efforts.<sup>379</sup>

Risk and uncertainty are not explicit in Lockean or Kantian justifications for property rights, but they arguably play an implicit role. Locke’s proffered examples of property-generating labor mostly involve labor directly applied to immediate objects: gathering apples and acorns, mining ore, and so on. Locke also suggests, however, that investment in activities that may result in appropriation of objects in nature is a kind of labor that justifies the creation of property rights in the fruits of those efforts. Thus, the individual who makes efforts toward “find[ing] and pursu[ing]” a hare “hath begun a property” in the hare, suggesting that property rights may arise from speculative activity.<sup>380</sup> In the hare example, the pre-appropriation property right helps ensure a return on the investment in the hunt by reducing the risk of competing claims by subsequent pursuers.<sup>381</sup> The notion that productive speculation could be grounds for establishing a property claim over the fruits of that investment seems consistent with Locke’s philosophy. He was concerned with labor that adds value and improves the human condition. The speculator who bears the risk of seeking or growing apples where none was certain to exist arguably adds more value through their speculation (a form of labor) than an appropriator who merely picks an apple and claims it. As applied to copyright theory, authorial labor is akin to the hare hunt: the labor is speculative and risky because there is no guarantee that the effort will bear commercial fruit, but the author is assured the right to profit from the effort if it does.

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377. *Id.* at 77.

378. *See* Hughes, *supra* note 374.

379. MERGES, *supra* note 33, at 81.

380. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 135–36 (Thomas I. Cook ed., Hafner Pub. Co. 1947) (1690).

381. It is reasonable to assume return on risk plays a role here, because earlier in the same passage Locke discusses property rights that arise in captured animals. *See id.* (arguing that deer and fish are properly the property of the one who killed or caught them). In the hare example, Locke would unquestionably find property rights attach once the hare is caught. So, why should he acknowledge the necessity of property rights that arise *before* the hare is caught? Presumably because capture is not assured, the investment of labor remains speculative until capture, and there is a risk an interloper could free-ride on the pursuer’s efforts to locate and flush out the animal (which, of course, is what later happened in the famous case of *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805)).

As regards Kant, Merges points out that the practical importance of Kant's application to intellectual property today comes down to financial autonomy for creators: "Creative people are rarely free to create, and cannot effectively shape their destiny, if they cannot control and have little prospect of being paid for their creative work."<sup>382</sup> In other words, authorship is speculative: for creative people, the choice is between taking a paid job and repressing one's desire for autonomy and self-rule versus exercising one's autonomy at substantial financial risk. Ensuring a right to the returns on that risk is a critical part of a system that encourages and enables creators to follow their life plan.

One erroneous assumption is bound to arise when discussing deontological theories of copyright and entrepreneurial property rights in profits and ventures: that entrepreneurship theory and deontological justifications for copyright both point to unlimited copyright. In fact, the logic of deontological justifications for copyright provides for significant limitations on the copyright holder's rights when others in society have a compelling interest in accessing or using the works.<sup>383</sup> As noted in Section III.C, copyright is bound by a set of limiting principles that, Merges argues, apply regardless of one's normative convictions.<sup>384</sup> These limiting principles are internal to the field. To the extent entrepreneurship theory informs the field, it is certainly subject to the same limiting principles.

### C. COPYRIGHT, ENTREPRENEURSHIP, AND DISTRIBUTIVE JUSTICE

This Section considers some distributive justice implications for an entrepreneurship theory of copyright. In their article "Copyright and Distributive Justice," Justin Hughes and Robert Merges analyze copyright's economic distributive effect on society through a Rawlsian framework.<sup>385</sup> They focus on the extent to which copyright economically empowers authors at the middle and lower end of the economic spectrum. In doing so, they aim to refocus the conversation around copyright and fairness from fair access to fair distribution of wealth. They conclude that "copyright, through a form of property, does not only or disproportionately reward large corporate interests. Copyright is, and can be, an important tool to promote a just distribution of income and wealth in society."<sup>386</sup>

A significant portion of Hughes and Merges' article focuses on Rawls's "Difference Principle," which holds that "social and economic inequalities are

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382. MERGES, *supra* note 33, at 18.

383. *Id.* at 96.

384. *See supra* notes 155–157 and accompanying text.

385. *See* Hughes & Merges, *supra* note 38, at 528–61.

386. *See id.* at 576.

to be arranged so that they are both (a) to the greatest benefit of the least advantaged . . . and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”<sup>387</sup> With respect to the equality of opportunity requirement, Hughes and Merges argue that copyright has been especially effective by at least one measure: “the copyright system as it presently functions, *warts and all*, arguably provides the most robust mechanism for disadvantaged groups, particularly African Americans, to accumulate wealth.”<sup>388</sup>

The copyright industries have a long history of creator exploitation—especially regarding underrepresented groups and women—and remain rife with racial and gender barriers and inequality.<sup>389</sup> Even so, the copyright industries have provided a unique upward mobility path for individuals from disadvantaged backgrounds.<sup>390</sup> Alan Krueger found that in 2016, Black artists represented 38% of musicians in the rarified air of the Billboard Top 100.<sup>391</sup> In the general U.S. population, by contrast, African Americans account for just 1.7% of individuals in the top 1% of net worth.<sup>392</sup> Merges and Hughes observe that most of the wealthiest African Americans built their fortunes through the copyright industries.<sup>393</sup> In a 2016 list compiled by Hughes and Merges, twenty-two of the top twenty-five wealthiest African American entrepreneurs in the United States made substantial portions of their wealth through music, film, television, broadcast sports, and publishing.<sup>394</sup> These statistics speak volumes about the copyright industries’ importance to African Americans as platforms for opportunity and wealth accumulation. They also speak volumes about the

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387. *Id.* at 519.

388. *Id.* at 549.

389. See, e.g., K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008); Lateef Mtima, *An Introduction to Intellectual Property Social Justice and Entrepreneurship: Civil Rights and Economic Empowerment for the 21st Century*, in INTELLECTUAL PROPERTY, ENTREPRENEURSHIP, AND SOCIAL JUSTICE: FROM SWORDS TO PLOUGHSHARES 1, at 6 (Lateef Mtima ed., 2015); STACY L. SMITH, MARC CHOUËITI, KATHERINE PIEPER, KEVIN YAO, ARIANA CHASE & ANGEL CHOI, INEQUALITY IN 1,200 POPULAR FILMS: EXAMINING PORTRAYALS OF GENDER, RACE/ETHNICITY, LGBTQ & DISABILITY FROM 2007 TO 2018 (2019).

390. KRUEGER, *supra* note 14, at 72.

391. *Id.*

392. See Tanzina Vega, *It’s Lonely in the Black 1%*, CNNMONEY (Oct. 14, 2016), <https://money.cnn.com/2016/10/14/news/economy/black-1-unstereotyped/index.html>.

393. Hughes & Merges, *supra* note 38, at 553–54.

394. *Id.*

barriers African American entrepreneurs face in all other sectors of our economy.<sup>395</sup>

The underrepresentation of people of color among the ranks of entrepreneurs is well recognized in the literature.<sup>396</sup> In 2015, 39% of new American businesses were started by people of color. Just 9% of those new entrepreneurs were African American.<sup>397</sup> The Center for Global Policy Solutions reports that “African American men were the only group to have a decline in the number of their businesses in the period from 2007 through 2012.”<sup>398</sup> The disparity is even starker in the technology sector. A 2017 survey found that just 1% of venture-backed technology firm founders in the United States were African American.<sup>399</sup> Unsurprisingly, these numbers reflect deep-seated systemic biases: “[T]he accumulated evidence that [minority business owners] collectively face higher barriers than white small-business-owners is simply overwhelming. These persistent disadvantages are often rooted in discriminatory practices, past and present disadvantages that economists often struggle to recognize.”<sup>400</sup>

This provides a vivid object lesson in the real-world ramifications of the rhetorical and conceptual divide between “authors” and “entrepreneurs” in copyright scholarship. When we fail to recognize that authors bear the same risks, face the same uncertainties, and are as innovative as “traditional” entrepreneurs, we fail to see that policy prescriptions targeting authors exacerbate the already profound obstacles that entrepreneurs of color face.<sup>401</sup> Calls to limit authorial income to “efficient” levels, which, as discussed above, are common in copyright scholarship,<sup>402</sup> perpetuate institutional biases when no calls are being made to similarly limit entrepreneurial income in other sectors.

395. See Elizabeth L. Rosenblatt, *Social Justice and Copyright's Excess*, 6 TEX. A&M J. PROP. L. 5, 16 (2020) (“[Hughes and Merges’s] statistic may say more about racially oppressive conditions in *other* industries than it does about racially beneficial impacts of copyright.”).

396. Timothy Bates, William D. Bradford & Robert Seamans, *Minority Ownership in Twenty-First Century America*, 50 SMALL BUS. ECON. 415, 416 (2018).

397. *Id.*

398. ALGERNON AUSTIN, CENTER FOR GLOBAL POLICY SOLUTIONS, THE COLOR OF ENTREPRENEURSHIP: WHY THE RACIAL GAP AMONG FIRMS COSTS THE U.S. BILLIONS 3 (2016).

399. See RATEMYINVESTOR, DIVERSITY IN U.S. STARTUPS 8 (2017). The survey also found that less than 2% of venture-backed technology firm founders were Latino. *Id.*

400. Bates et al., *supra* note 396, at 417.

401. See Mtima, *supra* note 389, at 20–28.

402. See *supra* note 11 and accompanying text.

A recent example illustrates the point. Professor Lunney's book *Copyright's Excess* proposes capping copyright income for music artists.<sup>403</sup> This is necessary in Lunney's view because "copyright's principal effect—if not purpose—today is to enrich vastly a relative handful of artists and authors at the very top of their respective professions."<sup>404</sup> Lunney argues that income could be capped by limiting a work's copyright duration to a certain number of sales (or in the digital era, streams). He proposes that a sound recording enter the public domain—and stop generating income for the author—after it is streamed 150 million times on Spotify.<sup>405</sup> "Under this approach," Lunney writes, "the copyright on the average song on Spotify, streamed 15,000 times a day, would last more than 27 years. The copyright on Drake's *One Dance* would last 33.6 days."<sup>406</sup>

Lunney's example puts the intersection of copyright, entrepreneurship, and distributive justice in sharp relief. At the current rate of roughly \$3.18 paid per 1,000 streams on Spotify, 150 million streams would generate \$477,000 for the copyright owners of the "One Dance" master recording.<sup>407</sup> Drake presumably shares a significant portion of that with his record label (I will assume that a superstar such as Drake could command a 50% royalty, although it may be less).<sup>408</sup> Lunney does not explain why \$238,000 is sufficient compensation for creating a recording that was among the few in history to spend ten weeks at number one on Billboard's Top 100,<sup>409</sup> except to posit that

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403. LUNNEY, *supra* note 3, at 198.

404. *Id.* at 198.

405. *Id.* at 199.

406. *Id.* Lunney notes that Spotify streams alone would probably not be a sufficient measure of consumption because there are other streaming services, so the counting methodology might be adjusted to account for money earned across multiple platforms. *Id.* The precise metric used is nonessential to either of our arguments so, for simplicity's sake, I stick with his Spotify-oriented proposal to make my point.

407. See Dmitry Pastukhov, *What Music Streaming Services Pay Per Stream (And Why It Actually Doesn't Matter)*, SOUNDCHARTS BLOG (June 26, 2019), <https://soundcharts.com/blog/music-streaming-rates-payouts> ("Since the average stream pays \$0.00318, 1000 streams on Spotify will earn the rights holder(s) of a [sound recording] about \$3.18."). The calculation is complicated by the fact that streaming royalties are divided between record labels and artists (who combined receive about 84% of royalties) and songwriters and music publishers (who receive about 16%). The point is not to estimate the precise amount of Drake's income from 150 million streams, but rather to generate a ballpark figure for illustrative purposes.

408. See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 92 (2019) (noting that superstars typically command a 20% or higher royalty for streaming revenue).

409. Gary Trust, *Drake's One Dance Tops Hot 100 for 10th Week*, (July 18, 2016), <https://www.billboard.com/articles/columns/chart-beat/7439135/drake-one-dance-hot-100-10th-week>.

at that point “the artist has had a fair opportunity to recover her authorship investment.”<sup>410</sup>

Drake is a Black artist and creator. It is fair to ask whether a policy that drastically limits incomes in a sector in which African Americans make up a comparatively high percentage of top earners is justified when no proposals are proffered to cap entrepreneurial earnings in any other sector of the economy. The distinction that Drake’s income is authorial, not entrepreneurial, is arbitrary and discriminatory.<sup>411</sup>

If the concern from an income inequality standpoint is that the top-earning creators make too much money, then the same might be said for the most successful entrepreneurs in every industry in the United States. Income inequality is a systemic problem requiring system-wide solutions, such as redistributive tax policies that treat entrepreneurs alike across industries. Surgical excision of income from a single class of producer is not an equitable solution. Treating authors as exceptional economic actors whose income should be subjected to strict limitations reinforces and exacerbates systemic barriers to success by minority entrepreneurs.

Financially empowering minority authors through copyright has distributive and signaling effects that go well beyond enriching a few individuals. Loren Mulraine observes how “intellectual property social justice can be attained by black creative artists and entrepreneurs in the music business, and . . . they can in turn further utilize entrepreneurial mechanisms to achieve economic enrichment and empowerment for their communities.”<sup>412</sup> Hughes and Merges highlight social psychology research on the demonstration effects same-race role models have on children’s self-esteem and perceived life opportunities: “For young minority children, just the knowledge that someone

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410. LUNNEY, *supra* note 3, at 199.

411. See *supra* Part VI; see also Stan J. Liebowitz, *Is Efficient Copyright a Reasonable Goal?*, 79 GEO. MASON L. REV. 1692, 1702 (2011) (“It appears that copyright policy provides a sui generis instance where apparent social welfare maximization can be undertaken without the appearance of draconian government intervention in the economy. This lack of concern about the inferior treatment given to talented creators under theoretically ideal copyright might be because copyright is framed as the government *helping* creators by providing any property right to creators at all, albeit incomplete and temporary rights. If the government, in noncopyright activities, were to try to limit the rents of certain individuals below what employers or markets were willing to pay, that would be seen as the government *hindering* those individuals in their attempt to make a living, and tampering with the market since it is presumed that individual workers are entitled to the fruits of their labor.”).

412. Loren Mulraine, *I Am My Brother’s Keeper: How the Crossroads of Entrepreneurship, Intellectual Property and Entertainment Can Be Used to Effect Social Justice*, in INTELLECTUAL PROPERTY, ENTREPRENEURSHIP, AND SOCIAL JUSTICE: FROM SWORDS TO PLOUGHSHARES, *supra* note 389, at 209–34, 225.

like them has amassed a vast fortune opens the door to greater possibilities in their own future.”<sup>413</sup> The point here is not to exaggerate copyright’s role as a mechanism for broad distributive justice but rather to show how entrepreneurship theory prompts us to think outside the copyright silo. Seeing authors as part of a larger group of entrepreneurs illuminates the discriminatory effects that result from singling out authorial income versus other forms of entrepreneurial income.

Finally, proposals such as Lunney’s that would restrict copyright income to the author’s “persuasion costs” would result in a marked redistribution of wealth from entrepreneurs in one sector—copyright industries—to those in another sector—technology. To see how, one only need imagine that Lunney’s proposal is adopted: we single out and cap authorial income, limiting Drake’s copyright duration for “One Dance” to 150 million Spotify streams and thrusting the work into the public domain after a month. The money from Spotify’s revenue pool that would have been apportioned to Drake is now supposedly freed up for distribution among struggling artists and consumers.

It is, however, implausible that consumers and middle-class artists would capture most or all of the surplus. YouTube, Spotify, Facebook, and other online distributors would continue to collect enormous advertising and subscription revenues associated with streams of “One Dance” and the many other ultra-popular works regularly entering the public domain under such a proposal. With no royalties to pay, these companies would keep the revenue for themselves.<sup>414</sup> Greater and greater market power would accrue to these

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413. Hughes & Merges, *supra* note 38, at 560.

414. At the time of this writing, YouTube is by far the most popular music streaming platform in the world. See Tim Ingham, *Over 2BN YouTube Users Are Now Playing Music Videos Every Month*, MUSIC BUS. WORLDWIDE (Nov. 17, 2020), <https://www.musicbusinessworldwide.com/over-2bn-youtube-users-are-now-watching-music-videos-every-month/>. YouTube pays music copyright owners on a per-stream basis, meaning that if there is no copyright owner associated with content, YouTube can keep the revenue for itself. See *id.* It is unclear how Spotify’s payment distribution formula treats streams of public domain works. See Digital Audio/Video Distribution Agreement between Sony Music and Spotify USA Inc., at 12 (on file with author). However, if Spotify were to simply cease counting plays of “One Dance” toward the pool, it would presumably result in a larger share of the pool going to the biggest artists whose works remain under copyright. Spotify could also alter its distribution formula to be able to keep whatever percentage of revenue would be associated with the large number of public domain works under a scheme such as Lunney’s. It might, for example, switch from the current pro rata distribution formula to a user-centric model, in which each subscriber’s monthly payment would constitute its own pool to be divided according to that individual subscriber’s streaming choices. See Joseph Dimont, Note, *Royalty Inequity: Why Music Streaming Services Should Switch to a Per-Subscriber Model*, 69 HASTINGS L.J. 675, 694 (2018). Some streaming services, including Deezer, have experimented with this

intermediaries, enabling them to put further downward pressure on the price of licenses, accumulating even greater gains for themselves. There is no mystery around this: several experts have written extensively about such dynamics and the abusive practices they engender in markets with historically weak copyright enforcement, such as China and Nigeria.<sup>415</sup>

Lunney argues that copyright is a poor tool for effecting distributive justice because the distribution of income in the superstar-heavy copyright industries is highly skewed.<sup>416</sup> He cites data showing that the Gini coefficient—a measure of distributional inequality—for creators of various types of copyrighted works ranged from .71 to .98 (where the higher the number, the more unequal the income distribution).<sup>417</sup> Moreover, he observes, income inequality has increased markedly in the copyright industries over the past two decades.<sup>418</sup>

True, like many entrepreneurial fields, the copyright industries operate according to blockbuster economics.<sup>419</sup> But the copyright industries still appear to provide a better path to upward mobility than many others. Late Princeton and Obama Administration economist Alan Krueger, in a 2016 study on the upward mobility of musicians, found that less than one-fifth of musicians in the of the top 1% of earners came from households in the top 10% of income distribution.<sup>420</sup> In the broader economy, by contrast, nearly half of the top 1% of earners grew up in households in the top 10% of income distribution.<sup>421</sup> The numbers for bottom-to-top upward mobility are even more revealing: more than a quarter of *Billboard* Top 100 artists (who are likely to be in the top

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model. See Stuart Dredge, *Spotify Should Pay Musicians More? Let's Talk More About How*, MUSIC:ALLY.COM (May 5, 2020), <https://musically.com/2020/05/05/spotify-should-pay-musicians-more-lets-talk-about-how/>. Under a user-centric model, services would not necessarily be obligated to pay any rightsholder the share of a user's streams that is associated with public domain works. Further, rather than helping middle-class artists, this regime would likely increase their suffering as subscription services shed subscribers and revenue. Why would subscribers continue to pay current subscription fees when the hottest songs are freely, easily, and lawfully accessible everywhere online within weeks of release?

415. See, e.g., Priest, *supra* note 109, at 514–20; Pager, *Commercialization and Copyright*, *supra* note 130, at 16 (“The internet is subject to power laws even more ruthless than those offline, and rather than empowering diverse content and independent voice, the digital age has reinforced existing hierarchies of influence while creating new ones.”); Sean A. Pager, *The Role of Copyright in Creative Industry Development*, 10 L. & DEV. REV. 521 (2017); Liu, *supra* note 233.

416. Glynn S. Lunney, Jr., *Copyright's Excess Revisited*, 6 TEX. A&M J. PROP. L. 59, 84–85 (2020).

417. *Id.*

418. *Id.*

419. See generally ELBERSE, *supra* note 125.

420. KRUEGER, *supra* note 14, at 74.

421. *Id.* at 74.

1% of earners) come from households in the bottom 10% of income distribution.<sup>422</sup> Among the top 1% of earners in the broader economy, by contrast, just 2% come from the poorest 10% of households.<sup>423</sup> A large percentage of musicians in the bottom-to-top mobility group are hip-hop artists, among whom people of color are the majority.<sup>424</sup> Krueger concludes that “a career in music is associated with much greater bottom-to-top mobility than in the economy overall,” and that “music remains more democratic than the economy as a whole.”<sup>425</sup> Moreover, technology industries—which are the biggest winners if copyright is enfeebled—are among the worst offenders when it comes to winner-take-all, considerably worse than the copyright industries.<sup>426</sup>

In sum, the arbitrary distinction between authors and entrepreneurs obscures the parallel between the two and thus rationalizes discriminatory treatment of authorial income in the name of “efficient” copyright. Policies that would drastically limit the income of creative professionals would have significant negative implications for distributive justice. They would increase the already sizable obstacles facing African American entrepreneurs in particular, who are comparatively well represented among the ranks of successful authors. Further deepening the inequality, such policies would work an extensive redistribution of wealth away from authors to the ranks of technology companies, among whom minorities are grossly underrepresented.<sup>427</sup>

#### D. DOCTRINAL IMPLICATIONS

Recall that Section III.A.2, above, argues that under an entrepreneurship theory of copyright, copyright is appropriate compensation for the author’s innovation and risk bearing in the face of market uncertainty. The innovation aspects of entrepreneurial authorship are reflected in copyright’s originality requirement and the requirement’s corollary rule that protection is denied for

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422. *Id.* at 73.

423. *Id.*

424. *Id.* at 73–74.

425. *Id.*

426. PwC, *INDUSTRY GINI INDEX: HOW “WINNER-TAKE-ALL” IS SHAPING US BUSINESS* (2017), <https://www.pwc.com/us/en/library/industry-gini-index.html>. On PwC’s 2016 Industry Gini Index, the “Technology Hardware, Storage and Peripherals” sector tops the list of industries with the highest industry concentration with a Gini coefficient of .89. *Id.* “Internet Software and Services” is the sixth most unequal sector with a Gini coefficient of .81. By contrast, “Movies and Entertainment” is twentieth on the list with a Gini coefficient of .71. *Id.* “Publishing” falls even farther down the list at number seventy-one, with a Gini Coefficient of .39. *Id.*

427. *See supra* note 399 and accompanying text.

facts and other matter that do not originate from the author.<sup>428</sup> However, another key component of entrepreneurship theory—risk bearing—is not as well reflected in copyright doctrine. As is outlined in Part III, authors engage in socially and economically valuable speculation. Because of the speculative nature of authorship, authors are not made whole for their efforts at the outset. The author’s only compensation for bearing the risk of sunk costs is a property right that provides an opportunity to recoup costs through commercialization.<sup>429</sup> Although risk bearing plays an implicit role in copyright theory and to some extent in copyright doctrine, some areas of copyright doctrine could benefit from explicit consideration of the author’s risk bearing.

1. *Using Commercial Risk to Define Copyright’s Scope—The Case of Academic Publishing*

As noted in Section III.C, commercial risk could be employed as a factor in determining the scope of rights. Academic publishing presents a useful example of how the level of authorial risk bearing could be used to delineate the scope of protection or, in the unlikely event of a statutory amendment, even act as a threshold requirement for protection.

As I have written elsewhere, several unique characteristics of the academic publishing industry (particularly academic journals) make it unusually conducive to monopoly pricing.<sup>430</sup> First, many academic journals enjoy “must-have” status among researchers, meaning there are no effective market substitutes. Second, there is resultant low-price elasticity. To ensure their researchers have uninterrupted access, libraries will pay for journals despite price increases. Third, journals enjoy low acquisition costs: they typically publish articles written by academics who are compensated for their work by their universities, so no royalties are usually owed. Fourth, pricing takes place within the context of university budgeting outside of normal market price and demand signals. Fifth, the market for academic journals is inherently limited, so to increase profits publishers cannot simply print more journals, they must raise prices. Lastly, publishers use bundling strategies to maximize profits, further distorting the market by ensuring that libraries cannot cherry pick the most essential journals to reduce costs.<sup>431</sup>

Other markets for copyrighted works lack this confluence of unique characteristics and therefore could not support the sort of monopoly pricing

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428. See *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 347 (1991).

429. See *supra* Section III.A.

430. Eric Priest, *Copyright and the Harvard Open Access Mandate*, 10 NW. J. TECH. & INTELL. PROP. 377, 386–87 (2012).

431. See *id.*

that occurs in academic publishing. Thus, the academic publishing market is an outlier. However, it is an important outlier due to the importance of the content in academic journals, the need of researchers and students to access that content, and the industry's size. In 2019, higher education publishing, professional publishing, and university presses combined for over \$5 billion in U.S. revenue.<sup>432</sup>

The case of academic scholarship supports the argument that commercial risk bearing is an appropriate factor to consider when determining the subject matter and scope of copyright. The lack of commercial risk in the academic authorial process is a major contributor to the distortion of the academic journal publishing market. Professors who are already made whole for their authorial efforts through university-paid salaries are neither facing market uncertainties nor taking commercial risks through their production. It is difficult to make an economic argument that under such circumstances a property right should vest, just as venture ownership does not typically vest in employees whose salaries or wages have already made them whole.<sup>433</sup> Of course, there are hard cases. Textbooks, for example, are a form of academic authorship that falls somewhat outside the academic's normal publication expectations and therefore involves greater opportunity cost and risk. But production of most scholarly articles by college or university faculty clearly involves little to no commercial risk. The justification for copyright protection in that case is weak.

This does not mean that the university should instead own the work as an employer under work-for-hire rules. That question is fraught with difficulty under U.S. copyright law.<sup>434</sup> But even setting aside the technical question of who the initial owner of copyright in a scholarly work is, the justification for granting the university a copyright is equally dubious under an entrepreneurship theory of copyright because universities do not incur commercial risk vis-à-vis scholarship produced by their professors. If, as I argue, copyright promotes progress by supporting authorship forged in the crucible of market uncertainty and commercial risk, then some forms of

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432. See Press Release, Ass'n Am. Publishers, *AAP StatShot Annual Report: Book Publishing Revenues Up Slightly to \$25.93 Billion in 2019* (July 31, 2020), <https://publishers.org/news/aap-statshot-annual-report-book-publishing-revenues-up-slightly-to-25-93-billion-in-2019/>.

433. For a discussion of how an entrepreneurship theory of authorship intersects with copyright's work-for-hire rules, see *infra* Section VII.D.4.

434. See Priest, *supra* note 430, at 401–10.

academic publishing seemingly fall outside the scope of what should receive protection.<sup>435</sup>

### 2. *Commercial Risk as Part of the Fair Use Analysis*

The plaintiff's commercial risk bearing could be incorporated into the fair use defense framework as a supplemental factor. More realistically, it could inform the analysis under the second and fourth factors—the nature of the copyrighted work and the effect of the use upon the potential market for or value of the copyrighted work.<sup>436</sup> The inquiry would be, what level of risk and uncertainty did the author face in the authorial process? Was the author compensated for their production? Was it a personal letter or email made with minimal investment and opportunity cost? Was it a marketing blurb on a shampoo bottle<sup>437</sup> or a bit of software code on printer cartridges with no purpose other than to inhibit competition?<sup>438</sup> If the nature of the work is such that it was produced with little commercial risk to the author and little expectation of commercial gain by distribution of the work itself, then in a fair use analysis a lack of commercial harm under the fourth factor could be presumed. On the other hand, where a defendant uses works that were commercially risky to produce, such as songs, films, or more elaborate software programs, such commercial risk bearing would be one factor weighing explicitly against a finding of fair use.

### 3. *Substantial Similarity*

Creative risk is already a major factor in the scope of protection a work receives: protected expression is a creative deviation from banal, trite, and conventional expression, *scènes à faire*, facts, themes, and other stock and public domain elements.<sup>439</sup> Works imbued with more creative risk are afforded a broader scope of protection in the substantial similarity analysis. Courts could also consider the *commercial* risks involved in undertaking the creative venture. If the plaintiff's work involved little or no commercial risk (a personal letter or marketing blurb, for example) then the scope of protection would be thin to nonexistent since substantial similarity—at least as some courts formulate it—

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435. *But see* Adam Mossoff, *How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World*, 2015 MICH. ST. L. REV. 955 (2015) (arguing that copyright revenues drive innovation in distribution of scholarship).

436. *See* 17 U.S.C. § 107 (2018).

437. *See* *Quality King Distributors Inc. v. L'anza Research Int'l Inc.*, 523 U.S. 135 (1998).

438. *See* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (2004).

439. *See* *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 348 (1991); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979–80 (2d Cir. 1980).

is about protecting the plaintiff's market.<sup>440</sup> Certain types of works might presumptively involve low commercial risk and impose a higher burden on the plaintiff to demonstrate a level of commercial risk and potential commercial harm that justifies a substantial similarity finding.<sup>441</sup>

#### 4. *Works Made for Hire*

Work made for hire rules present one area in which risk bearing has had an explicit role in copyright doctrine. Work for hire rules vest copyright authorship and ownership in an employer if an employee created the work within the scope of their job.<sup>442</sup> The application of entrepreneurship theory discussed above provides a framework for understanding why creative employees might be treated differently from independent contractors.

As a salaried worker or wage earner, the typical creative employee is relatively insulated from downside risk. The tradeoff is that such an employee does not partake directly in the upside of their creation. By working for a company in the creative industries rather than “superintend[ing] the creation of [their] own creative program,”<sup>443</sup> such employees have traded the risks and higher upside of potential property income for the relative dependability but limited upside of a salary or wage. The same would often be true of, say, a salaried employee at a clothing company who is not the business owner. The employee will probably not participate in the company's upside as an equity owner because they have not made the same level of upfront investment and are not vulnerable to the same level of commercial risk as the founder.

Work for hire doctrine caselaw for works created under the 1909 Copyright Act expressly considered downside risk bearing as an important factor in determining whether an employer should be awarded authorship.<sup>444</sup>

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440. *See, e.g.*, *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (“The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts.”), *abrogated on other grounds, as recognized in* *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir.1975).

441. *See supra* Section III.C.

442. 17 U.S.C. § 101 (2018) (defining “work made for hire”).

443. *Hughes & Merges, supra* note 38, at 569 (italics omitted).

444. *See, e.g.*, *Urbont v. Sony Music Entm't*, 831 F.3d 80, 89 (2d Cir. 2016) (“The ‘expense’ component [of the work made for hire test] refers to the resources the hiring party invests in the creation of the work, in order to properly reward with ownership the party that bears the risk with respect to the work's success.”) (quotation marks and brackets omitted); *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 140 (2d Cir. 2013); *Siegel v. Warner Bros. Entm't Inc.*, 658 F. Supp. 2d 1036, 1058 (C.D. Cal. 2009) (“[I]n speaking of the expense in the creation of the work, the focus is not on who bore the costs or expense in physically creating the work

In those cases, a major consideration in determining the level of risk bearing is whether the creator received “periodic payments of a sum certain [that] bear the hallmark of the wages of an employee” or whether the creator “receives royalties as payment,” which indicates that the creator is sharing in the downside risk.<sup>445</sup>

In *Community for Creative Non-Violence v. Reid*, the Supreme Court announced an agency-based test for determining whether an employer-employee relationship exists under the 1976 Copyright Act work for hire rules.<sup>446</sup> The *Reid* factors differ from the work for hire factors developed by courts under the 1909 Act, and the explicit assessment of market risk bearing has not carried over. Nevertheless, some factors considered under the current rule still indirectly bear on whether the hired or hiring party bore greater risk.<sup>447</sup> Consideration of whether the work was produced within the scope of the creator’s employment is also arguably an implicit inquiry into the relative risk bearing of the parties.

## VIII. CONCLUSION: THE TWILIGHT OF AUTHORIAL EXCEPTIONALISM

Authors have long been conceptually separated from entrepreneurs because authors produce nonrivalrous information goods, while entrepreneurs produce rivalrous physical goods and services. Challenging this authorial exceptionalism is important for copyright theory and ultimately authors’ livelihoods. No one argues that efficiency requires we cap every entrepreneur’s income at the amount needed ex ante to persuade them to start their business. The defining question in copyright theory, however, is how much does efficiency require we cap authorial compensation? The orthodox utilitarian view that efficiency requires we award the least incentive possible in exchange for artistic creation poses intractable problems. How can we determine authorial motivations ex ante and match authors’ entitlements so that their income is capped at their “persuasion costs?” If someone creates for intrinsic,

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itself (the money spent to purchase the paper on which the dialogue and story elements was printed, the typewriter used to put into concrete form the author’s concepts of the same, and the pencils and ink needed to draw the illustrations, etc.). . . . Instead, the focus is on who bore the *risk* of the work’s profitability.”).

445. *Siegel*, 658 F. Supp. 2d at 1058.

446. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 741 (1989).

447. For example, factors arguably related to relative financial risk under the current rule include which party supplied a work location and creative tools and what method of payment was used, such as whether the hiring party paid regular wages. *Id.* at 751–52.

nonpecuniary reasons, should they be awarded a copyright at all, or would that be social waste?

Entrepreneurship theory provides a richer theoretical framework for understanding copyright's incentive function. Authors possess the defining features of entrepreneurs: they bear risk in the face of market uncertainty and they innovate. As with entrepreneurs, risk bearing distinguishes authors from salaried employees: authorial and entrepreneurial income are unfixable at the outset and therefore distinct from salaries or wages. Because authors and entrepreneurs cannot be compensated in advance, the grant of a property right is critical: it is their compensation for speculative risk bearing. Understanding authorial income as compensation for risk bearing and innovation shifts the inquiry's focus away from an oversimple notion of incentives. One can respond to intrinsic motivations and still bear risk. It is risk bearing—not whatever fillip happened to motivate the author—that is material to the grant of the property right. Moreover, an entrepreneurship theory of copyright better accounts for incentives for intermediaries that share in the work's commercial risk. It also fits with the evolution of disintermediation, as the lines between authors and risk intermediaries increasingly blur and authors take on more business functions themselves.

The reasons usually cited for treating authors as a class of economic actors distinct from other entrepreneurs are unpersuasive. Copyright does not give rise to economic monopolies, and thus the monopoly pricing and rent seeking that animates concerns at the heart of the distinction do not appear to play out in markets for many copyrighted goods. Indeed, the concern about supracompetitive pricing for copyrighted works is increasingly outdated with the explosive rise of flat-fee digital subscription services in which the “price” for copyrighted and public domain works is identical. Concerns about copyright's dynamic costs—inhibiting follow-on creation and access to works—are always warranted. But the friction copyright introduces hardly seems excessive today given the staggering volume of content created and affordably accessible. This undermines urgent calls to target authorial “overcompensation” on efficiency grounds. Meanwhile, tech entrepreneurs increasingly earn their wealth from exploiting nonrivalrous information rather than from selling rivalrous goods, meaning authorial profits are no longer unique in their theoretically limitless scalability. The model on which the author-entrepreneur distinction rests is anachronistic.

An entrepreneurship lens also illuminates how copyright functions simultaneously as an intangible asset and a vehicle for investment, value accumulation, and securitization. Copyright ownership is akin to equity ownership in a startup company. Each work is, in effect, a discrete venture.

The work, like a venture, is built through effort, risk bearing, innovation, and partnerships that support the extended chain of commercialization activities necessary to bring high-quality works to market.

Lastly, viewing copyright and authorship through an entrepreneurship lens highlights distributive justice concerns that arise from proposals to cap copyright income at authorial persuasion costs. Entrepreneurs of color—many of whom are authors—are disproportionately well represented in the copyright industries. Viewing authors as entrepreneurs prompts us to think outside the copyright silo and see authors as part of a larger group of entrepreneurs, illuminating the discriminatory effects of singling out authorial copyright income versus entrepreneurial income in all other sectors of the economy.