

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2021

Self-Actualization and the Need to Create as a Limit on Copyright

Christopher S. Yoo

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Developmental Psychology Commons](#), [Intellectual Property Law Commons](#), [Law and Philosophy Commons](#), [Law and Psychology Commons](#), [Other Philosophy Commons](#), [Personality and Social Contexts Commons](#), [Philosophy of Language Commons](#), [Philosophy of Mind Commons](#), [Property Law and Real Estate Commons](#), and the [Science and Technology Law Commons](#)

Repository Citation

Yoo, Christopher S., "Self-Actualization and the Need to Create as a Limit on Copyright" (2021). *Faculty Scholarship at Penn Law*. 2041.

https://scholarship.law.upenn.edu/faculty_scholarship/2041

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

Self-Actualization and the Need to Create as a Limit on Copyright

Christopher S. Yoo*

ABSTRACT

Personhood theory is almost invariably cited as one of the primary theoretical bases for copyright. The conventional wisdom views creative works as the embodiment of their creator’s personality. This unique connection between authors and their works justifies giving authors property interests in the results of their creative efforts.

This Chapter argues that the conventional wisdom is too limited. It offers too narrow a vision of the ways that creativity can develop personality by focusing exclusively on the results of the creative process and ignoring the self-actualizing benefits of the creative process itself. German aesthetic theory broadens the understanding of the interactions between creativity and personality. Psychologists, aestheticians, and philosophers have underscored how originating creative works can play an important role in self-actualization. When combined with the insight creative works frequently borrow from the corpus of existing works, this insight provides a basis for broadening fair use rights. Moreover, to the extent that works must be shared with audiences or a community of like-minded people in order to be meaningful, it arguably supports a right of dissemination.

The result is a theory that values the creative process for the process itself and not just for the artifacts it creates, takes the interests of follow-on authors seriously, and provides an affirmative theory of the public domain. The internal logic of this approach carries with it a number of limitations, specifically that any access rights be limited to uses that are noncommercial and educational and extend no farther than the amount needed to promote self-actualization.

Introduction.....	2
I. Toward a Broader Conception of Personhood and Creative Works.....	7
A. Creativity and Self-Actualization through Play	8
1. Kant.....	9
2. Schiller	11
B. Toward a More Active Vision of Creativity through Play	12
1. Psychology: Maslow, Rogers, and Self-Determination Theory	13
2. Aesthetics and Education	18
3. Capabilities Theory: Sen and Nussbaum	19
C. The Cumulative Nature of Creativity	20

* John H. Chestnut Professor of Law, Communication, and Computer & Information Science and Founding Director of the Center for Technology, Innovation and Competition, University of Pennsylvania. A longer version of this article is forthcoming as *Copyright and Personhood Revisited: Kant, Hegel, and the Role of Play* in the 2019 volume of the *University of Illinois Law Review*.

D.	The Need for an Audience	26
1.	Internalizing the Audience’s Expected Reaction	27
2.	Valuing Community.....	30
II.	Implications for the Personhood-Based Theories of Copyright	33
A.	Insights	33
1.	A Broader Vision of the Relationship Between Creativity and Personality.....	33
2.	Greater Importance to Follow-On Authors.....	34
3.	An Affirmative Theory of the Public Domain	34
B.	Limits	35
1.	Noncommerciality.....	35
2.	The Emphasis on Education.....	37
3.	Implicit Limits to the Rights of Access and Dissemination	38
	Conclusion	39

INTRODUCTION

Personhood theory figures prominently in virtually every list of justifications for intellectual property in general¹ and copyright in particular.² Typically ascribed to the philosophical ideas of Georg William Friedrich Hegel and Immanuel Kant, this theory posits that authors have such deep connections with their creations that respect for their sense of self requires giving them a degree of ongoing control over those works.³ In essence, works are

¹ See, e.g., ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*: 2018, at 7–12 (2018); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 289–91 (1970); William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 171–72, 189–92 (Stephen R. Munzer ed., 2001); Seanna Valentine Shiffrin, *Intellectual Property*, in *2 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 653, 660 (Robert E. Goodin et al. eds., 2d ed. 2007).

² See, e.g., Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1542 (“[W]orks of art are created through a person’s mental labor, and thus embody more of her individual essence of being than works created through routine physical labor. Since artistic works are part of an artist’s very identity, she never should be completely separated from the work.”).

³ See, e.g., 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 145 (2d ed. 1987); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 1, 26–29 (1988); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 359–61, 374–77 (1993).

treated as extensions of the author’s person.⁴ As such, certain types of interference with those works would be tantamount to intruding on a part of the author’s body.

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

The result is a strong vision of copyright that gives initial authors near absolute control over many aspects of copyright protection, including derivative works, to the exclusion of audiences and follow-on authors.⁷ In many cases, personhood interests are so strong as to render moral rights inalienable.⁸ In addition, the traditional approach to personhood theory values creative works only as static artifacts. The role of creativity in developing personality is limited to how the works are treated after they have been created and accords no role to the process of how works are created.

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

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

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

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

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

I believe that the conventional wisdom takes far too narrow a perspective on the relationship between copyright and personhood. By focusing exclusively on how creative works are treated after they have been created, the conventional wisdom ignores a broader range of ways, first suggested by the aesthetic writings of Kant and Friedrich Schiller, that creativity can develop personality. Since then, a vibrant literature in psychology, aesthetics, and philosophy has arisen that explores how the heuristic process of creating works can play a key role in self-actualization. A more encompassing conception of the relationship between personhood and creativity would regard creative works as more than mere repositories of personality and would examine how the process of creation itself can develop personality.

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

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

The broader approach to personality also offers a possible response to one of the criticisms of existing copyright scholarship, which is the failure to provide a clear, affirmative

theory of the public domain.⁹ Indeed, even public domain advocates concede that the public domain remains defined largely in negative terms¹⁰ and recognize the need for better articulation of affirmative theories of the public domain.¹¹ The revised personhood-based justification for copyright offers a basis for identifying a core of creative material that must remain in the public domain if individuals are to develop their sense of self.

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

⁹ Most trenchantly, Edward Samuels asks whether “the public domain [is] simply whatever is left over the after various tests of legal protection have been applied?” or whether the public domain is animated by “some compelling public policy or legal principle, that gives it a life of its own, that would tend to attribute positive aspects to it,” only to conclude “that there is no such animal: the public domain is simply whatever remains after all methods of protection are taken into account.” Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC’Y U.S.A. 137, 137–38 (1993); *accord id.* at 149 (concluding, after reviewing the proffered affirmative justifications for the public domain, that “it would appear that there simply is no such general theory”); *see also* Edward Samuels, *The Public Domain Revisited*, 36 LOY. L.A. L. REV. 389, 391 (2002) (reaffirming Samuels’s belief that “what I said in 1993 is essentially still correct”); Vincenzo Vinciguerra, *Contributing to the Understanding of the Public Domain*, 24 J. MARSHALL J. COMPUTER & INFO. L. 411, 453 (2006) (noting that “the sum of the very different approaches and theories contribute to an image of the public domain as an ‘empty box,’ capable of every form and meaning, and thus, with no defined form altogether”).

¹⁰ *See* James Boyle, *Foreword: The Opposite of Property*, LAW & CONTEMP. PROBS. Winter/Spring 2003, at 1, 30 (“The term ‘public domain’ is generally used to refer to material that is unprotected by intellectual property rights . . .”); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968, 976 (1990) (describing the public domain as “a commons that includes those aspects of copyrighted works which copyright does not protect” and “the realm comprising aspects of copyrighted works that copyright does not protect”); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 217 (2002) (“Often the public domain is defined in terms of what it is not.”).

¹¹ *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 361–62 (1999) (“The particular weakness of the traditional definition of the public domain is that it evokes an intuition about the baseline, while not in fact completely describing it.”); James Boyle, *Cultural Environmentalism and Beyond*, LAW & CONTEMP. PROBS. Spring 2007, at 5, 8 n.11 (recognizing that “we do need a better theory of the public domain,” while acknowledging that the result may be multiple, overlapping theories).

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

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

The Chapter is organized as follows: Part I examines the aesthetic tradition exploring the role that creativity serves in developing a person's faculties and personality, taking as its starting point the seminal work of Kant and Schiller exploring the role that play (*spiel*) plays in creating personality. Although Kant and Schiller offered a passive vision of play, in which audiences simply contemplate great works of art, later psychologists, aestheticians, and philosophers articulated a more active vision in which individuals actively engage in the creative process.¹² It culminates in a theory that recognizes that individual self-actualization may depend on people

¹² Other scholars have explored how play can shape personality. Julie Cohen views play as the result of interactions between the "networked self" and the cultural and architectural context in which is situated. JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 3–5, 32–33, 50–57, 82, 225–29 (2012). Madhavi Sunder sees play as an important part of a participatory culture. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 71–73 (2012) and shared meaning. This Chapter views play as an intrinsic motivation that emanates entirely from the individual and is not shaped by extrinsic considerations. Examining play through the lens of the philosophy, psychology, and aesthetics also provides normative content to the concept of play, which addresses one of the central limitations of Cohen's work. See Niva Elkin-Koren, *Affordances of Freedom: Theorizing the Rights of Users in the Digital Era*, 6 JERUSALEM REV. LEGAL STUD. 96, 103-04 (2012).

becoming authors themselves. Drawing on the work recognizing that creativity often builds on prior works, this theory suggests that individual self-development may require a degree of access to the preexisting corpus of creative works. It then explores whether, in addition to being created, creative works must be read or shared with a community in order to play a role in developing one's sense of personality, which would in turn support a right of dissemination.

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

I. TOWARD A BROADER CONCEPTION OF PERSONHOOD AND CREATIVE WORKS

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

impulses.¹³ Although Kant's and Schiller's vision of play involved passive contemplation of creative works, later psychologists, aesthetic scholars, and philosophers explored how creating works can play an essential role in promoting self-actualization.

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

A. Creativity and Self-Actualization through Play

The fonts of modern theories of how creativity can develop personality are the work of Kant and Schiller.¹⁴ Although many developmental psychologists focus on the consequentialist aspects of play,¹⁵ such as a release of excess energy,¹⁶ a safety valve for discharging pent-up emotions,¹⁷ or the practice of behaviors that will become useful later in life,¹⁸ the German

¹³ For an early work that hinted at this idea without developing it, see David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Most-Literate Millennium*, LAW & CONTEMP. PROBS., Spr. 1992, at 139.

¹⁴ MIHAI SPARIOSU, *DIONYSUS REBORN: PLAY AND THE AESTHETIC DIMENSION IN MODERN PHILOSOPHICAL AND SCIENTIFIC DISCOURSE* (1989).

¹⁵ For a survey, see Dorothy W. Jackson & Henry R. Angelino, *Play as Learning*, 13 THEORY INTO PRACTICE: VALUE OF PLAY FOR LEARNING 317, 318–20 (1974).

¹⁶ Herbert Spencer.

¹⁷ See Konrad Lange, *Illusion in Play and Art*, in *A MODERN BOOK OF ESTHETICS* 5 (Melvin Rader ed., 3d ed. 1960).

¹⁸ See KARL GROOS, *THE PLAY OF MEN* (1908).

tradition values play for its ability to allow each person to develop her own sense of self rather than for its ability to promote other more consequentialist values.

1. Kant

The seminal modern statement of how creative works can contribute to human self-actualization appears in the first part of Immanuel Kant's *Critique of Judgment* in a section entitled the "Analytic of the Beautiful."¹⁹ According to Kant, humans experience the "feeling of life," described as the pleasurable experience of being endowed with and exercising a freedom that transcends the world and everything in it, only when they are in a "state of free play" completely free from any restraining concepts.²⁰ Human beings engage in free play when they make "judgments of beauty."²¹ Beauty is not an inherent characteristic of an object, such as a statement about its shape or its color, which may not evoke any feelings of pleasure at all. Instead, judgments of beauty necessarily represent a person's visceral reactions to the object.²²

In addition, judgments of beauty are distinct from statements of preference, which reflect the speaker's appetites and interests. Although such statements also refer to subjective experiences of pleasure produced by objects, the desire to consume or appropriate an object reflects what Kant calls an "interest" in the object. Having an interest in an object makes a person dependent on it.²³ This need draws the person along in a way that makes that person not completely free. It is only when a person's "wants" have been "appeased" that such a statement

¹⁹ IMMANUEL KANT, *CRITIQUE OF JUDGMENT* (J.H. Bernard trans., Hafner Publ'g Co. 1951) (1790). The discussion that follows draws on Anthony Kronman, *Is Poetry Undemocratic?*, 16 GA. ST. L. REV. 311, 318–26 (1999).

²⁰ KANT, *supra* note 19, at 52.

²¹ *Id.* at 42.

²² *Id.* at 56.

²³ *Id.* at 43.

constitutes a true judgment of beauty.²⁴

Judgments of beauty are also distinct from judgments of moral duty, such as the classic Kantian categorical imperative. Kant writes, “Where the moral law speaks, there is no longer, objectively, a free choice as regards what is to be done.”²⁵ Only judgments that are exercised independently of reason and desires produce the pleasure associated with judgments of beauty. Indeed, judgments of beauty are inherently not rule-bound, since there is no rule about what is beautiful and what is not. Thus Kant concludes that art is “genuine only if it is autonomous.”²⁶

Instead, judgments of beauty reflect an “entirely disinterested satisfaction” that is a feeling of wholeness and integrity that is fully gratified merely by observing the object.²⁷ It is only when people are unconstrained by wants or rules that their cognitive faculties are in a state of free play,²⁸ which Kant describes as “purposiveness without purpose.”²⁹ Indeed, conceived in this manner, aesthetic pleasure is the pleasure of freedom itself.

Although judgments of beauty are inherently subjective, the fact that they are disinterested and independent of individual preferences creates the potential for those judgments to be shared by others as well. Kant regarded judgments of beauty as invitations to others to recognize this same pleasurable power in themselves.³⁰ Indeed, every judgment of beauty contains an aspiration toward universality that is missing from mere statements of preference or personal taste, carrying with it the expectation that others can and ought to share that judgment.³¹ Sharing a judgment of beauty that has the potential to be universally communicable with others

²⁴ *Id.* at 44.

²⁵ *Id.* at 45.

²⁶ *Id.* at 62.

²⁷ *Id.* at 45.

²⁸ *Id.* at 52.

²⁹ *Id.* at 62, 68.

³⁰ Kronman, *supra* note 19, at 326.

³¹ KANT, *supra* note 19, at 59.

who possess the same ability to experience this freedom for themselves creates a shared experience that goes beyond two people reaching the same conclusion after conducting the same scientific experiment. The anticipated pleasure of being in the company of one's equals in communication with them gives rise to the pleasure that Kant calls "sociability."³²

2. Schiller

Kant's work prompted a response from Schiller. Best known as the second-leading figure of German literature (behind only Goethe), Schiller has long been overlooked as an aesthetic theorist. His early work directly challenged Kant's subjective vision of aesthetic taste, laying out a theory of art "based on principles."³³ Schiller defined beauty as the result of harmony between opposing forces: the physical and the moral, duty and inclination. He described this harmony as the *Schöne seele* ("beautiful soul"), which is the human product of the synthesis or harmony of opposing drives reconciled through a process of aesthetic education.³⁴

In his *Aesthetic Letters*, Schiller focuses explicitly on the concept of play as the means for reconciling these conflicting drives. In explaining his theory of aesthetics as the path to freedom, Schiller discusses the primary elements of human experience as "impulses" (*triebe*).³⁵ The form impulse (*formtrieb*) reflects the tendency of the mind toward rational explanations and structure, while the material or sensual impulse (*stofftrieb*) looks to concrete facts for its explanations of the world around it.³⁶

The play impulse (*spieltrieb*) is the aesthetic drive that brings these opposing drives

³² *Id.* at 139.

³³ FRIEDRICH SCHILLER, ON THE AESTHETIC EDUCATION OF MAN IN A SERIES OF LETTERS, letter 26 (Reginald Snell trans., 1954) (1793).

³⁴ *Id.* letter 12.

³⁵ *Id.*

³⁶ *Id.*

together and holds them in tension.³⁷ The ultimate form of play, he states, is in contemplating the beautiful, the process described above through which the viewer can temporarily engage both drives at once, allowing moral and physical constraints to cancel each other out in a way that sets the psyche free.³⁸ Thus, for Schiller, the ability to play is representative of freedom. Indeed, “man . . . is only fully a human being when he plays.”³⁹ Rather than degrading beauty to a mere frivolity, the term “play” is intended to connote liberation.

Together, Kant and Schiller emphasized the importance of the idea of play in the human experience. Under this conception, play is undertaken for its own sake, which stands in stark contrast to the consequentialist visions of play that view it as an outlet for excess or compensation for deficient energy, practice for adult life, a mechanism for the assimilation of information, or some other instrumental purpose.⁴⁰ Instead, play develops the sense of self directly and is valued for itself.

B. Toward a More Active Vision of Creativity through Play

What is particularly striking about Kant’s and Schiller’s views is the passiveness of their vision of play. Under this conception, play involved the appreciation of great works of art that could only be created by great masters. This so-called Romantic vision of authorship does not recognize any value to individuals’ efforts to author creative works on their own, a position criticized for its attempt to justify privileging the positions of authors.⁴¹

³⁷ *Id.* letter 15.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See supra* notes 15-18 and accompanying text.

⁴¹ Indeed, a leading scholar has attributed this in large part to Schiller’s desire for financial self-sufficiency and his frustration at Germany’s failure to enact meaningful copyright protection. *See* MARTHA WOODMANSEE, AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 59 (1994) (discussing Schiller’s desire to promote his own self-sufficiency by promoting German adoption of copyright law); Anne Barron, *Kant,*

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

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

Psychology provides perhaps the strongest foundation for the important role that individual authorship of creative works can play in the development of personality. One prominent example is Abraham Maslow's celebrated study on the hierarchy of needs, which posited that humans are motivated by the drive to satisfy five basic needs.⁴² Only after the more fundamental needs are satisfied can individuals seek to satisfy needs located higher in the hierarchy.⁴³ At the top of the hierarchy is the need for self-actualization, which "is not necessarily a creative urge although in people who have any capacities for creation it will take this form."⁴⁴

Maslow early work speaks of creative expression as if it were the unique province of artistic people,⁴⁵ suggesting that artists find the drive to create so strong that it is never satisfied.⁴⁶ His later work breaks from this limited vision of creativity, emphasizing that self-actualizing creativity was not limited to the artistic class by drawing a distinction between

Copyright and Communicative Freedom, 31 LAW & PHIL. 1, 26 (2012) (noting that "Kant's major concern in the 1785 Essay is in fact to legitimize the book trade . . . and the profits that may be realized from it").

⁴² Specifically, these needs are physiological, safety, love, esteem, and self-actualization. Abraham Maslow, *A Theory of Human Motivation*, 50 PSYCH. REV. 370 (1943). He developed it further in ABRAHAM MASLOW, MOTIVATION AND PERSONALITY 80–92 (1954).

⁴³ Maslow, *supra* note 42, at 394.

⁴⁴ *Id.* at 383.

⁴⁵ Maslow, *supra* note 42, at 382 ("A musician must make music, an artist must paint, a poet must write, if he is to be ultimately happy. What a man *can* be, he *must* be. This need we may call self-actualization.").

⁴⁶ *Id.* at 386 ("There are other, apparently innately creative people in whom the drive to creativeness seems to be more important than any other counter-determinant. Their creativeness might appear not as self-actualization released by basic satisfaction, but in spite of lack of basic satisfaction.").

“special-talent creativeness” and “self-actualizing creativeness.”⁴⁷ Broadening the conception of creativity permits Maslow to recast creativity as “a fundamental characteristic, inherent in human nature, a potentiality given to all or most human beings at birth.”⁴⁸ Under this revised vision, cooks, hostesses, homemakers, social service workers, and clinical psychiatrists can all be creative in their own way and noted that “a first-rate soup is more creative than a second-rate painting, and that, generally, cooking or parenthood or making a home could be creative while poetry need not be.”⁴⁹ He “learned to apply the word ‘creative’ . . . not only to products but also to people in a characterological way, and to activities, processes, and attitudes.”⁵⁰ Indeed, self-actualizing creativeness “stresses first the personality rather than its achievements, considering these achievements to be epiphenomena emitted by the personality and therefore secondary to it.”⁵¹ Creative people “are all integrators, able to bring separates and even opposites together into unity.”⁵² The “inner integration of the person” is what permits creativeness to be “constructive, synthesizing, unifying, and integrative.”⁵³ Indeed, “the creativity of [Maslow’s] subjects seemed to be an epiphenomenon of their greater wholeness and integration.”⁵⁴

Maslow finds creativity “hard to define because it seems to be synonymous with health itself” and “almost synonymous with, or a *sine qua non* aspect of, or a defining characteristic of,

⁴⁷ A.H. Maslow, *Creativity in Self-Actualizing People*, in CREATIVITY AND ITS CULTIVATION 83, 85 (Harold H. Anderson ed., 1959), reprinted in ABRAHAM MASLOW, TOWARD A PSYCHOLOGY OF BEING 135, 137 (2d ed. 1968); and ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY 158, 160 (3d ed. 1987).

⁴⁸ *Id.* at 137.

⁴⁹ *Id.* at 136.

⁵⁰ *Id.* at 137.

⁵¹ *Id.* at 145.

⁵² *Id.* at 140.

⁵³ *Id.*

⁵⁴ *Id.* at 141; see also *id.* at 144 (arguing for increased emphasis “on the role of integration (or self-consistency, unity, wholeness) in the theory of creativeness”).

essential humanness.⁵⁵ Although his later work adopts a similar tone,⁵⁶ it implies a more causal relationship between creativity and self-actualization, suggesting that creative expression should be part of any educational curriculum “not so much for turning out artists or art products, as for turning out better people,” because the creative process plays a key role allowing people to “become full human beings” and to “move toward actualizing the potentialities that they have.”⁵⁷ Maslow further describes how during “the inspirational phase of creative furore,” the creative person “loses his past and his future” and becomes “utterly lost in the present.”⁵⁸ When people create, they are “then *most* integrated, unified, all of a piece, one-pointed, totally organized in the service of the matter-at-hand.”⁵⁹ “Creativeness is therefore systemic; i.e., a whole—or Gestalt—quality of the whole person”⁶⁰ that allows “the fusion of the person and his world.”⁶¹ It is at these moments when people are “most fully realizing themselves, most mature and evolved, most healthy, when, in a word, they are most fully human.”⁶²

Carl Rogers similarly regards creativity as a reflection of “man’s tendency to actualize himself, to become his potentialities.”⁶³ “It is this tendency which is the primary motivation for creativity as the organism forms new relationships to the environment in its endeavor more fully to be itself.”⁶⁴ The motivation is intrinsic, not extrinsic. Although creativity may be socially

⁵⁵ See *id.* at 145.

⁵⁶ Abraham H. Maslow, *The Creative Attitude*, 3 THE STRUCTURIST 4, 4 (1963) (“My feeling is that the concept of creativeness and the concept of a fully-human person seem to be coming closer and closer together, and may perhaps turn out to be the same thing.”).

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 9.

⁶⁰ *Id.*

⁶¹ *Id.* at 10.

⁶² *Id.* at 6; see also A.H. Maslow, *Emotional Blocks to Creativity*, 14 J. INDIV. PSYCH. 51 (1958) (describing how creativity allows the fusion of people’s primary processes, which are unconscious and unbounded) and their secondary processes, which are conscious, rational and more constrained, thereby achieving the unity that characterizes self-actualized people).

⁶³ Carl R. Rogers, *Toward a Theory of Creativity*, 11 ETC.: REV. GEN. SEMANTICS 249, 251 (1954).

⁶⁴ *Id.* at 252.

beneficial, “the individual creates primarily because it is satisfying to him, because this behavior is felt to be self-actualizing.”⁶⁵ Creativity is not the unique province of great works, applying equally to “creating new formings of one’s personality in psychotherapy” as to “painting a picture, composing a symphony, devising new instruments of killing, developing a scientific theory, [or] discovering new procedures in human relationships.”⁶⁶ In short, creativity is a capacity that exists in every individual.

Rogers expands on these thoughts in his later work. Like Maslow’s self-actualized person, Rogers views his ideal “fully functioning person” as a creative person “from whom creative products and creative living emerge.”⁶⁷ In a later book chapter based on this article, he concludes that “a person who is involved in the directional process which I have termed ‘the good life’ is a creative person.”⁶⁸ Rogers in turn defines the good life as “the process of movement in a direction which the human organism selects when it is inwardly free to move in any direction, and the general qualities of this selected direction appears to have a certain universality.”⁶⁹

These themes have found modern expression in the Self-Determination Theory (SDT) developed by Edward Deci and Richard Ryan⁷⁰ and extended to copyright by Terry Fisher.⁷¹ SDT represents a modern version of theories that regard human behavior as motivated by the

⁶⁵ *Id.*

⁶⁶ *Id.* at 250.

⁶⁷ Carl R. Rogers, *The Concept of the Fully Functioning Person*, 1 PSYCHOTHERAPY: THEORY, RES. & PRAC. 17, 23 (1963), reprinted in CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST’S VIEW OF PSYCHOTHERAPY 183, 193 (1961). Maslow recognized the connection as well. A.H. Maslow, *A Holistic Approach to Creativity*, in CLIMATE FOR CREATIVITY: REPORT OF THE SEVENTH NATIONAL RESEARCH CONFERENCE ON CREATIVITY 287, 288 (Calvin W. Taylor ed., 1971).

⁶⁸ ROGERS, supra note 67, at 193.

⁶⁹ *Id.* at 187.

⁷⁰ See Edward L. Deci & Richard M. Ryan, *The “What” and the “Why” of Goal Pursuits: Human Needs and Self-Determination of Behavior*, 11 PSYCH. INQ. 227 (2000).

⁷¹ William W. Fisher III, *The Implication for Law of User Innovation*, 94 MINN. L. REV. 1417, 1465 (2010).

need to satisfy innate psychological needs rather than serving instrumental goals.⁷² In particular, SDT posits that humans are motivated by the need to fulfill three psychological needs: competence, relatedness, and autonomy.⁷³

In focusing exclusively on psychological needs, SDT excludes behaviors motivated by physiological needs.⁷⁴ In addition, SDT focuses on intrinsically motivated activities, defined as “those that individuals find interesting and would do in the absence of operationally separable consequences,”⁷⁵ such as “[a] man who, in the evening, sits at the keyboard and begins to play a piece of music, may become lost in its beauty and experience great pleasure.”⁷⁶ Deci and Ryan note that “intrinsic motivation is associated with better learning, performance, and well-being.”⁷⁷ Promoting intrinsic motivation in turn encourages creativity,⁷⁸ whereas introduction of external motivations reduces both the sense of self determination and creativity.⁷⁹ Interestingly, Deci and Ryan argue that individuals can internalize extrinsic motivations in ways that are consistent with need satisfaction so that they in turn become part of their own intrinsic motivation.⁸⁰

* * *

Together these psychologists view creativity as an innate attribute of fully self-actualized individuals. These people pursue creativity as an end unto itself. Those engaging in self-actualizing creativity become lost in the moment. Indeed, any extrinsic motivation destroys the

⁷² Deci & Ryan, *supra* note 70, at 227, 231.

⁷³ *Id.* at 228,

⁷⁴ *Id.* at 229.

⁷⁵ *Id.* at 233.

⁷⁶ *Id.* at 230.

⁷⁷ *Id.* at 233.

⁷⁸ *Id.* at 258.

⁷⁹ *Id.* at 234.

⁸⁰ *Id.* at 235–39.

self-actualizing quality of creativity. The focus is neither on the consequences of the art nor on the tangible output, but rather on how the process of creation itself develops the sense of self.⁸¹

2. Aesthetics and Education

Aesthetic theorists have similarly emphasized the role that creativity can play in developing each individual's sense of self. Aesthetician Eugene Kaelin writes that "[t]he ultimate value of aesthetic expressions" lay in "the discovery of my own personality: of those feelings (some of which are forced upon me by my environment) which correlate most clearly with my true self. The self, then, must be such as to be developed by expression."⁸² R.G. Collingwood similarly notes that "an artist creates in order to get his feelings clear," which in turn induces clarity to her psychic conditions.⁸³

The key role that creating works can play in personal development has led many scholars to argue that art should represent a fundamental component of every child's education.⁸⁴ Some believe artistic expression allows people to explore who they are and what makes them unique.⁸⁵ Others echo Schiller by arguing that creating art permits individuals to achieve unity of body and mind.⁸⁶ Still others contend that the release of emotion and ideas through creativity permits individuals to become more fully integrated and developed as human beings.⁸⁷ This school of

⁸¹ See, e.g., EDWARD L. MATTIL, *THE SELF IN ART EDUCATION 1* (1972) (National Art Education Association Research Monograph #5) (citing Maslow and Rogers as the basis for theories connecting creativity and personality); Willet W. Ryder, *The Role of Art in Self-Actualization*, ART EDUC., Mar. 1987, at 22, 22, 24 (same).

⁸² EUGENE F. KAE LIN, *ART AND EXISTENCE: A PHENOMENOLOGICAL AESTHETIC* 90 (1970).

⁸³ R.G. COLLINGWOOD, *THE PRINCIPLES OF ART* (1958).

⁸⁴ For an overview, see Ryder, *supra* note 81, at 22, 23–24.

⁸⁵ See MATTIL, *supra* note 81, at 12–13; Frances K. Heussenstamm, *Humanizing Higher Education*, ART EDUC., Mar. 1971, at 17, 18.

⁸⁶ See Kenneth R. Beittel, *The Teaching of Art in Relation to Body-Mind Integration and Self-Actualization in Art*, ART EDUC., Nov. 1979, at 18.

⁸⁷ See Florence Cane, *Art in the Life of the Child*, in *CREATIVE EXPRESSION* (Gertrude Hartman & Ann Shumarer eds., 1926).

thought emphasizes that the process of creation matters more than the product,⁸⁸ which has become a theme echoed by modern scholars.⁸⁹

3. Capabilities Theory: Sen and Nussbaum

Other copyright scholars see a justification for personhood-theory in the “capabilities theory” pioneered by economist Amartya Sen⁹⁰ and extended by philosopher Martha Nussbaum.⁹¹ This approach places upon the state the obligation to provide every individual with the preconditions they need to flourish and to develop their faculties meaningfully.⁹²

Although some scholars suggest that human dignity only applies to needs lower in Maslow’s hierarchy and does not include copyright,⁹³ Nussbaum’s catalog of the key aspects of the human condition includes “Senses, Imagination, and Thought,” which encompasses being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth.”⁹⁴ In her other writings, Nussbaum also includes play, defined as “[b]eing able to laugh, to play, to enjoy recreational activities,” as one of the ten basic capabilities.⁹⁵ Development of such capabilities is valued for its own sake and not for some consequentialist or extrinsic benefits. Legal scholars have built on

⁸⁸ See Viktor Lowenfeld, *Creative and Mental Growth* (rev. ed. 1952).

⁸⁹ See LAWRENCE LESSIG, *MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 25, 27, 79 (2008).

⁹⁰ See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 288 (1999).

⁹¹ See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 78 (2000); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 70–76 (2006); Martha C. Nussbaum, *Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 *HARV. L. REV.* 4, 6 (2006).

⁹² See SEN, *supra* note 91, at 38–39, 288; Nussbaum, *supra* note 91, at 6.

⁹³ Edwin C. Hettinger, *Justifying Intellectual Property*, 18 *PHIL. & PUB. AFF.* 31, 45 (1989).

⁹⁴ NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 91, at 76–78.

⁹⁵ MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 35 (2011); MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 80 (2000).

the capabilities theory to argue that copyright should be shaped to ensure that people have the means to be creative.⁹⁶

* * *

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

C. The Cumulative Nature of Creativity

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

Virgil borrowed much from Homer, Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.⁹⁷

⁹⁶ See COHEN, *supra* note 12, at 21; SUNDER, *supra* note 12, at 7–8, 89Fisher, *supra* note 71, at 1466–76.
⁹⁷ Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) (Story, J.).

Ralph Waldo Emerson similarly noted that “the debt is immense to past thought. None escapes it. The originals are not original. There is imitation, model, and suggestion, to the very archangels, if we knew their history.”⁹⁸

Copyright scholars have frequently noted the extent to which works borrow from prior works when making arguments to limit protection for derivative works.⁹⁹ In particular, a literature has developed critiquing the influence of the Romantic vision of authorship, which regards creativity as springing fully formed from the author’s head.¹⁰⁰

A classic example of this line of scholarship is Jessica Litman’s article on *The Public Domain*, which observed that “[a]ll works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else’s works” and that “the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.”¹⁰¹ She notes that such observations in previous scholarship were almost invariably offered in passing without any analysis. Indeed, Jessica Litman has called the insight “such a truism that it has long been a cliché, invoked but not examined.”¹⁰² She proffers a more detailed description of the mechanism through which authors draw on other works subconsciously.¹⁰³ Authors create works without distinguishing

⁹⁸ Ralph Waldo Emerson, *Quotation and Originality*, in 8 COLLECTED WORKS OF RALPH WALDO EMERSON 93, 94 (Belknap 2010).

⁹⁹ See, e.g., Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 218 (1983); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990).

¹⁰⁰ See, e.g., James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 41 DUKE L.J. 455 (1991); Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

¹⁰¹ Litman, *supra* note 10, at 966.

¹⁰² *Id.*

¹⁰³ *Id.* at 1000–01.

whether the inspiration resulted from new ideas, past experiences, or works they have read.¹⁰⁴ Instead, works are the result of their entire range of experiences filtered through a “combination of absorption, astigmatism, and amnesia.”¹⁰⁵ Rather than being mere “parasitism,” borrowing is “the essence of authorship.”¹⁰⁶ It also provides a justification for ensuring that current authors have sufficient access to the preexisting corpus of works.¹⁰⁷ Although a literature has emerged challenging how much Romantic authorship has actually influenced U.S. copyright law,¹⁰⁸ these studies have not challenged the inherent cumulative nature of most (if not all) creative works.

Although Litman does not invoke the literature directly, Litman’s theory finds intellectual support from post-structural critical theory, which responded to New Criticism’s privileging of the work as a source of meaning by emphasizing the intertextual nature of all writings. For example, Northrop Frye admonished, “Poetry can only be made out of other poems; novels out of other novels.”¹⁰⁹ Frye rejected the view that “imagines that a ‘creative’ poet sits down with a pencil and some blank paper and eventually produces a new poem in a special act of creation *ex nihilo*,” noting that “[h]uman beings do not create in that way.”¹¹⁰ He critiqued the Romantic tendency “to think of the individual as ideally prior to his society.”¹¹¹ Instead, all works are “born into an already existing order of words.”¹¹² Each work of creativity can only be understood as part of a larger genre and the conventions surrounding that genre.¹¹³

¹⁰⁴ *Id.* at 1010.

¹⁰⁵ *Id.* at 1011.

¹⁰⁶ *Id.* at 967.

¹⁰⁷ *Id.* at 967, 1012.

¹⁰⁸ See Lionel Bently, R. v. The Author: *From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1 (2008); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (book review).

¹⁰⁹ NORTHROP FRYE, ANATOMY OF CRITICISM: FOUR ESSAYS 96 (1957).

¹¹⁰ *Id.* at 95.

¹¹¹ *Id.* at 95–96.

¹¹² *Id.* at 96.

¹¹³ *Id.* at 94–95.

Roland Barthes echoed the same themes when he argued that “a text does not consist of a line of words, releasing a single ‘theological’ meaning (the ‘message’ of the Author-God).”¹¹⁴ Instead, “the text is a tissue of quotations drawn from the innumerable centers of culture [The writer’s] only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any of them.”¹¹⁵ Harold Bloom similarly noted, “The more deeply and widely we read, the more we become aware that good poems, novels, and essays are webs of allusion, sometimes consciously and voluntarily so, but perhaps to a greater degree without design.”¹¹⁶ Julia Kristeva similarly notes that “any text is a mosaic of quotations; any text is the absorption and transformation of another.”¹¹⁷

Like Litman, literary theorists regard the process by which current works build on the preexisting literary corpus as being unconscious.¹¹⁸ Borrowing moves from the subconscious to the conscious in Lawrence Lessig’s most recent book, *Remix*. Through a series of anecdotes, Lessig celebrates what he calls Read/Write (RW) culture, in which people do not just consume culture; they add to it “by creating and re-creating the culture around them.”¹¹⁹ In contrast, to the previous Read Only (RO) culture, in which “[a]rtists want their expression framed just as they intend it,” RW culture “asks something more of the audience” in that “[i]t invites a response.”¹²⁰

¹¹⁴ Roland Barthes, *The Death of the Author*, in *IMAGE—MUSIC—TEXT* 142, 146 (Stephen Heath trans. 1977) (1967).

¹¹⁵ *Id.*

¹¹⁶ Harold Bloom in *Plagiarism—A Symposium*, *N.Y. TIMES LITERARY SUPP.*, Apr. 9, 1982, at 413.

¹¹⁷ Julia Kristeva, *Word, Dialogue, and Novel*, in *DESIRE AND LANGUAGE* 64, 66 (Leon S. Roudiez ed., Thomas Gora et al. trans., 1980). The preexisting corpus of works was not the only extrinsic source of interpretation under post-structural theory. The other contextual source was the values and perspective brought by the reader. *See infra* notes 140–142 and accompanying text.

¹¹⁸ *See* Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS* 61, 75 (Karen Hellekson & Kristina Busse eds., 2006).

¹¹⁹ LESSIG, *supra* note 89, at 28.

¹²⁰ *Id.* at 84, 85.

The more participatory culture surrounding RW culture creates a greater level of responsibility¹²¹ and permits children to develop a higher degree of cultural literacy,¹²² which Lessig equates to democratic literacy.¹²³ It has the added virtues of allowing kids to create their works within the context of a community and providing them with engaging subject matter to use as the building blocks for learning.¹²⁴

Lessig further argues that “[r]emix is an essential act of RW creativity” and advocates preserving a right to quote or remix as a “critical expression of creative freedom” that should be preserved.¹²⁵ Although the Internet and digital technologies have opened remix expression to the masses,¹²⁶ they have simultaneously given creators of the original works a greater ability to prevent would-be remixers from obtaining access to their works.¹²⁷ Although Lessig sees value in professional creativity,¹²⁸ he warns that the enhanced level of control culture threatens to stifle the benefits of participation and responsibility associated with amateur creativity.¹²⁹ To correct this balance, Lessig advocates adopting a hybrid approach that permits commercial and sharing cultures to coexist.¹³⁰ While he speaks in terms of balance, his policy recommendations¹³¹ and the concluding pages of his book¹³² indicate that his primary concern is ensuring that would-be remixers enjoy sufficient access to the raw material they need to create their works.

¹²¹ *Id.* at 86; *accord id.* at 22–27.

¹²² *Id.* at 80–81, 114.

¹²³ *Id.* at 107.

¹²⁴ *Id.* at 77–82.

¹²⁵ *Id.* at 56.

¹²⁶ *Id.* at 69, 82–83.

¹²⁷ *Id.* at 98–105.

¹²⁸ *Id.* at 84–85, 105–06, 291–92.

¹²⁹ *Id.* at 86; *accord id.* at 22–27.

¹³⁰ *Id.* at 225–249.

¹³¹ *Id.* at 253–73; *accord id.* at 109–14.

¹³² *Id.* at 293–94.

Fan fiction represents another prominent example of conscious borrowing from the existing corpus of works. Indeed, the intertextuality of fan fiction is not merely implicit. Instead, works of fan fiction consciously quote from a defined archive of works while simultaneously contributing back to it, claiming a specific relationship with that corpus and “pointedly locating themselves within the world.”¹³³ Far from being protected by property interests, the world of fan fiction “allows, or even invites, writers to enter it, select specific items they find useful, make new artifacts using those found objects, and deposit the newly made work back into the source text’s archive.”¹³⁴ Indeed, the fact that an entire community is accessing the same preexisting corpus provides the common bond that holds the community of fan fiction writers together.¹³⁵

* * *

Together these theories provide a basis for arguing that individual self-actualization depends on having sufficient access to the preexisting corpus of works. Some argue that the cumulative nature of creativity may be an inevitable aspect of the human condition. Others contend that even if borrowing from prior works is not inevitable, it provides certain benefits that are worth promoting as a matter of policy. When combined with the arguments discussed in Parts A and B connecting creativity with the development of personality, both suggest that preventing follow-on authors from obtaining sufficient access to prior works can harm the development of individual personality. Support for this position does not depend on the extreme

¹³³ See Derecho, *supra* note 118, at 65; Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS., Spring 2007, at 135, 143.

¹³⁴ Derecho, *supra* note 118, at 65.

¹³⁵ Letter from Rebecca Tushnet, Org. of Transformative Works, to U.S. Copyright Office, Library of Cong. 7 (Feb. 2, 2009), available at <http://www.copyright.gov/1201/2008/responses/organization-transformative-works-34.pdf>.

claim that no true works of independent creation exist. So long as derivative creativity remains an important source of self-actualization, the presence of examples of truly original inspiration would simply recalibrate the proper balance rather than eliminate all need for access to prior works.

D. The Need for an Audience

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

Such an argument would not necessarily lead to the broad type of access to preexisting works that advocates imagine. Some self-sufficient authors create for themselves and do not care if their work ever finds an audience. Indeed, if the act of creation itself is what develops personality, the need for self-actualization would be completely satisfied by a personal use right that did not include any right of dissemination. If anything, the emphasis that the psychological and aesthetic theories discussed above place on disinterestedness, intrinsic motivation, and living in the moment militate against such a right to disseminate.

That said, the idea that people will find fulfillment from authoring works that will never be read seems strange. Indeed, scholars as early as Aristotle recognized that "the poets merely follow their public, writing as its wishes dictate."¹³⁶ One branch of literary theory suggests that authors inevitably internalize their expectations of their readers' likely responses into their work.

¹³⁶ ARISTOTLE, POETICS, *in* THE RHETORIC AND THE POETICS OF ARISTOTLE 219, 239 (W. Rhys Roberts & Ingram Bywater trans., Modern Library 1954) (originally published circa 350 B.C.); *see also* ARISTOTLE, RHETORIC,

1. Internalizing the Audience's Expected Reaction

Anyone who has written or spoken in public appreciates how the nature of the audience can affect the content of the speech. Studies of the importance of an audience are best developed by the field of literary theory. Understanding this literature requires an appreciation of the overarching arc of scholarship in the field. Much of modern literary theory is a reaction to the New Criticism school that arose in the 1920s and 1930s, which focused on the close reading of texts as formal objects, independent of historical context.¹³⁷ A subsequent school known as Structuralism was similarly formal, but instead of focusing on words, it focused on the larger structures of signification that gave different words different meanings.¹³⁸ These schools shared a formal orientation and a desire to make interpretation more objective and scientific.

Structuralism in turn gave way to the cluster of schools that fit under the collective banner of Poststructuralism, with Barthes serving as a key transitional figure. While different flavors of Poststructuralism vary, they are based on the recognition that the structure that gives words meaning is a socially determined, cultural concept that can only be understood by analyzing the context in which words are used.¹³⁹ This accords audiences an important role in determining the meaning of texts.¹⁴⁰ Many theorists argue that meaning is the joint product of

in THE RHETORIC AND THE POETICS OF ARISTOTLE, *supra*, at 54–56, 121–28 (emphasizing the importance of tailoring one's argument to the audience).

¹³⁷ See, e.g., MONROE BEARDSLEY, AESTHETICS: PROBLEMS IN THE PHILOSOPHY OF CRITICISM (1958); ROGER FOWLER, LINGUISTIC CRITICISM (1986).

¹³⁸ The seminal work was FERDINAND DE SAUSSURE, WRITINGS IN GENERAL LINGUISTICS (Carol Sanders et al. trans., 2006).

¹³⁹ See *supra* note 139 and accompanying text.

¹⁴⁰ For a brief overview, see Peter J. Rabinowitz, *Reader-Response Theory and Criticism*, *in* THE JOHNS HOPKINS GUIDE TO LITERARY THEORY AND CRITICISM 606 (Michael Groden & Martin Kreiswirth eds., 1994).

authors and readers.¹⁴¹ More extreme versions of Poststructuralism give almost total primacy to audiences.¹⁴²

By focusing on the social meaning of speech, approaches that regard the interpretation of texts as the joint product of authors and audiences (or even the exclusive province of audiences) are directed externally rather than the more inward-focused concerns of self-development. This interactive conception of play is what animates the work of Hans-Georg Gadamer, in which the game plays the individual as much as the individual plays the game.¹⁴³ This conception of creativity as the joint product of authors and the contexts in which they operate is what animates Julie Cohen's exploration of interaction between play and creativity.¹⁴⁴

There is a different vision of the need for an audience that is exclusively intrinsically motivated and not the joint product of both authors and audiences. One branch of reader-response theory recognizes how authors may anticipate and incorporate how readers are likely to receive their work. For example, Gerald Prince discusses the role of "narratees," the persons to whom authors are addressing their work.¹⁴⁵ Indeed, Prince envisions the narratee as a character (sometimes present only implicitly)¹⁴⁶ who exists internal to the text, rather than a reader who is outside the text.¹⁴⁷

¹⁴¹ See, e.g., Barthes, *supra* note 114.

¹⁴² STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980). Note that not all reactions to structuralism focused on audiences. Other theorists advocated a return to focusing on authors' intentions. See, e.g., E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* (1967); P.D. JUHL, *INTERPRETATION: AN ESSAY IN THE PHILOSOPHY OF LITERARY CRITICISM* (1981).

¹⁴³ HANS-GEORG GADAMER, *TRUTH AND METHOD* 103, 105 (1960).

¹⁴⁴ COHEN, *supra* note 12, at 56.

¹⁴⁵ Gerald Prince, *Introduction to the Study of the Narratee*, in *READER-RESPONSE CRITICISM* 7 (Jane P. Tompkins ed., 1980) (reprinting article originally published in *Poétique* in 1973).

¹⁴⁶ *Id.* at 17–20, 22–23.

¹⁴⁷ *Id.* at 13 (concluding that indications of the nature of any particular narratee "whether explicit or indirect, should be interpreted on the basis of the text itself"); see also Rabinowitz, *supra* note 140, at 606.

Similarly, Wolfgang Iser discusses how authors write for an “implied reader.”¹⁴⁸ Unlike intended readers, which reflect the author’s aims, and hypothetical informed readers, whose qualities are socially determined, Iser’s implied reader has predispositions entirely laid down by the text itself “independent of any outside reality.”¹⁴⁹ In contrast to the insight that “literary texts take on their reality by being read,” the implied reader is “a textual structure anticipating the presence of a recipient without necessarily defining him” that “prestructures the role to be assumed by each recipient.”¹⁵⁰ Quite aside from any actual reader, the implied reader is a “role offered by the text” that provides a “a frame of reference within which individual responses to a text can be communicated to others,” thereby “provid[ing] a link between all the historical and individual actualizations of the text and mak[ing] them accessible to analysis.”¹⁵¹ From this perspective, even gaps that remain for readers to fill are part of the strategy of the author and thus under his control.¹⁵²

Prince’s and Iser’s vision of the role of audiences is more consistent with the internal impact (rather than the external social meaning) that is the focus of personhood-theory than is traditional reader-response theory. In essence, these audiences’ roles in interpreting texts are internalized by the author and reified in the text. The environment does influence authors, but in a non-recursive manner that authors internalize into their intrinsic motivations when authoring the work. Deci and Ryan noted, moreover, recursive processes often cause such external considerations to be internalized.¹⁵³

¹⁴⁸ WOLFGANG ISER, *THE IMPLIED READER: PATTERNS IN COMMUNICATION IN PROSE FICTION FROM BUNYAN TO BECKETT* (1974).

¹⁴⁹ WOLFGANG ISER, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* 34 (1978).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 36, 37–38.

¹⁵² Rabinowitz, *supra* note 140, at 606.

¹⁵³ *See supra* notes 80 and accompanying text.

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

One possibility is that authors may be so self-directed and may have so completely internalized extrinsic motivations that they write for themselves and may not care if their work ever finds a real-world audience. If so, personhood theory would not imply any right of dissemination. Another possibility is suggested by game theory, which has long recognized the anticipation of the consequences of choices can cause equilibria to unravel.¹⁵⁴ Authors whose works are never read will find that the process of anticipating their audience's reaction was an entirely hypothetical exercise. If they only realize this after the fact, they will have already gained the benefits with respect to self-actualization. More discerning authors who understand the overarching structure may be able to anticipate that the law will prevent them from sharing their works with others. This realization may demotivate certain authors, which in turn may prevent them from realizing the self-actualizing benefits of authorship.

2. Valuing Community

Another justification for the right to dissemination is implicit in the importance of community associated with remix and fan fiction cultures. Although saying that new works tend to build on prior works can justify a right of access to existing corpus, to the extent that the process is internal to the author, it does not imply any right to share those works. Consider the remix culture, which Lessig embraces because of the manner in which it promotes responsibility,

¹⁵⁴ For the classic work, see Reinhard Selten, *The Chain Store Paradox*, 9 THEORY & DECISION 127 (1978).

cultural literacy, and the democratization of content creation.¹⁵⁵ These values could arguably be satisfied by a personal use right that authorizes access to prior works for private purposes but forbids any publication of those works.

Lessig's argument invokes a second conceptual premise to support a right of dissemination: the value of creating content in a community in which members create for one another and help each other learn how create.¹⁵⁶ His success model is the anime subculture of Japan, in which children begin by making and sharing their own sketches with others and then are introduced to the larger subculture by an older child.¹⁵⁷ The result is that creators see themselves as participants in a self-supporting community.¹⁵⁸ Indeed, "the pleasures of production of transformative works are intrinsic to participating in a creative community rather than motivated by extrinsic financial rewards."¹⁵⁹

Community plays an even more central role for fan fiction, whose participants define themselves by a shared interest in a common body of work.¹⁶⁰ Many discussions of fan fiction emphasize the distribution of authorship and the centrality of a community of interpreters, who are also authors.¹⁶¹ Other members of the community provide feedback that helps new authors improve, with the shared desire for additional commentary on the common source material serving as the glue that holds the community together.¹⁶² Engagement with this larger

¹⁵⁵ See LESSIG, *supra* note 89, at 80–81, 86–88, 107, 114.

¹⁵⁶ *Id.* at 77.

¹⁵⁷ *Id.* at 79.

¹⁵⁸ *Id.* at 80.

¹⁵⁹ Mizuko Ito, *The Rewards of Non-Commercial Production: Distinctions and Status in the Anime Music Video Scene*, FIRST MONDAY, May 3, 2010, at 4, <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2968/2528>.

¹⁶⁰ Tushnet, *supra* note 135, at 7.

¹⁶¹ See Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 NOTRE DAME L. REV. 2133, 2140 (2011).

¹⁶² Tushnet, *supra* note 135, at 7; Tushnet, *supra* note 133, at 143 n.32 (discussing the value that fan fiction authors place on the "centrality of a community of interpreters" connected through "immediate feedback, constant discussions of underlying canon, and self-identification as members of a fandom based on particular source texts");

community is particularly important for younger authors, who learn from engaging with other members.¹⁶³ While many creators regard creating fan fiction “as an end in itself, and may only share their videos with a few close friends,” many create in order to obtain recognition and status that can only be achieved through approbation by a community characterized by an elaborate subculture that is quite hierarchical and stratified and governed by a core group of elites.¹⁶⁴

The presence of community makes the dynamics surrounding fan fiction somewhat complex. Although peer production is often lauded for its democratic qualities and accessibility to everyone,¹⁶⁵ like all social practices, every community of peer production is embedded in a structure with its own sets of rules. In the case of fan fiction, the ability to participate in a larger community in which transformative works can be shared and can receive feedback plays a central role in constituting the subculture. This reasoning does not lead to a rule of access in all contests. Indeed, it only applies to subcultures in which the cycle of publication and feedback is central to the subculture. Moreover, the fan fiction community insists that any such sharing be noncommercial.¹⁶⁶ Subject to these limitations, the example of fan fiction does support a limited right of dissemination.

Karen Hellekson, *A Fannish Field of Value: Online Fan Gift Culture*, 48 *CINEMA J.* 113, 115–16 (2009) (describing how “[w]riter and reader create a shared dialogue that results in a feedback loop of gift exchange, whereby the gift of artwork or text is repetitively exchanged for the gift of reaction, which is itself exchanged, with the goal of creating and maintaining social solidarity”); Ito, *supra* note 159, at 12 (noting how elite fan fiction writers “look to their peers for look to their peers for ongoing feedback and critique” and “acknowledge the importance of social support within the creative community”).

¹⁶³ See Tushnet, *supra* note 135, at 7.

¹⁶⁴ Ito, *supra* note 159, at 11–12.

¹⁶⁵ See LESSIG, *supra* note 89, at 84 (contrasting RW culture with the presence in RO culture with authoritative sources of interpretation); *id.* at 88 (arguing that RW culture “hides the hierarchy,” unlike RO culture, which “emphasizes the hierarchy”).

¹⁶⁶ See Hellekson, *supra* note 162, at 114–15; Rebecca Tushnet, *Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters*, 6 *I/S: J.L. & POL’Y FOR INFO. AGE* 1, 3 (2008).

II. IMPLICATIONS FOR THE PERSONHOOD-BASED THEORIES OF COPYRIGHT

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

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

A. Insights

Adopting a broader sense of the ways that creative works can promote personhood yields a number of important insights. These insights in turn have important implications for copyright law.

1. Creativity as a Process, Not an Artifact

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

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

2. Greater Importance to Follow-On Authors

Another shortcoming of the conventional wisdom regarding personhood theory is that it places almost exclusive importance on the interests of the initial author. Indeed, the interest of the initial author is often regarded as being so strong as to convey absolute, inalienable control over derivative works.¹⁶⁷

Kant's and Hegel's reluctance to recognize strong interests in derivative works acknowledges that derivative works reflect the personalities of follow-on authors as much as initial authors. Indeed, the process-oriented perspective on personhood reflected in the psychological, aesthetic, and philosophical literature shifts the focus away from creative works as static artifacts and instead reconceives of them as essential contributors to a dynamic process of self-actualization.¹⁶⁸

3. An Affirmative Theory of the Public Domain

The final and most important advantage of my proposed reconceptualization of personality theory is its potential to provide an affirmative theory of the public domain, the absence of which both proponents and opponents of the trend toward broader copyright protection have widely regarded a weakness.¹⁶⁹ As noted above, the public domain has often been defined as the residuum left after property rights have been defined. To the extent that

¹⁶⁷ See *supra* note 7 and accompanying text.

¹⁶⁸ See also COHEN, *supra* note 12, at 247.

¹⁶⁹ See *supra* notes 9–11 and accompanying text.

property justifications are economically focused, the scope of fair use naturally contracts as technological advances reduce transaction costs.¹⁷⁰

The broader conception I propose supports reforming copyright in ways that reflect the full range of ways that creative works can promote self-actualization. By recognizing how creating works both can develop personality and requires access to preexisting works, my approach to personality theory provides a justification for providing follow-on authors with access to the extant corpus of creativity.¹⁷¹ To the extent that those works must be shared with others in order to be meaningful, it also supports a right of dissemination.

B. Limits

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

1. Intrinsicness and Noncommerciality

One major limit is the extent to which any personhood-based rights of access and dissemination must be noncommercial. Commerciality has long presented a puzzle for copyright law. Some early cases regarded that the fact that a work is commercial uses presumptively fall

¹⁷⁰ See, e.g., Robert P. Merges, *The End of Friction? Property Rights and Contract in the “Newtonian” World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115 (1997).

¹⁷¹ For a related argument, see COHEN, *supra* note 12, at 246–47.

outside of fair use.¹⁷² Later cases clarified that the fact that a work is commercial in nature does not by itself disqualify derivative works from falling within fair use.¹⁷³

The internal logic of how creating works can develop personality suggests limiting the right of access to noncommercial uses. Kant’s initial exposition of how creative works can develop personality emphasized that the experience must be disinterested from personal wants and needs.¹⁷⁴ Psychological theory emphasizes that individuals can only pursue self-actualization after their more instrumental needs have been satisfied and that such self-actualization can only occur when people live in the moment, creating for its only sake without any focus on the implications for the future.¹⁷⁵

Lessig similarly focuses on the differences between commercial and gift cultures, emphasizing the differences in values¹⁷⁶ and observing that “price is poisonous” to reciprocal noncommercial cultures.¹⁷⁷ While Lessig would not limit access rights to noncommercial uses,¹⁷⁸ only noncommercial uses would be free, with those making commercial remixes having to pay a compulsory license fee.¹⁷⁹ Indeed, Lessig’s recognition of the benefits associated with commercial creativity necessary entails some type of balance.¹⁸⁰

The rationale for allowing authors to share works created from other works also militates against including commercial works within its scope. As noted earlier, the fan fiction community has adopted a strong norm against commercial uses as inconsistent with the

¹⁷² See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984).

¹⁷³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583–85 (1994).

¹⁷⁴ See *supra* note 27 and accompanying text.

¹⁷⁵ See *supra* notes 58, 65, 75 and accompanying text.

¹⁷⁶ LESSIG, *supra* note 89, at 118, 144–49, 232, 239

¹⁷⁷ *Id.* at 149.

¹⁷⁸ *Id.* at 56.

¹⁷⁹ *Id.* at 254–56; see also *id.* at 110–14 (describing how compulsory licensing would have benefitted remix culture).

¹⁸⁰ See *supra* note 128 and accompanying text.

reciprocity of exchange.¹⁸¹ Indeed, many regard commercial compensation as inconsistent with the reciprocal values that undergird the fan fiction community.¹⁸²

The internal logic of this vision of personhood suggests limiting any access and dissemination rights to noncommercial uses, as the need for self-actualization would be satisfied by the noncommercial uses. Although some suggest that the distinction between these commercial and noncommercial uses may prove slippery,¹⁸³ personhood justifications do not support a broader set of reforms.

2. The Emphasis on Education

Another limitation implicit in some portions of the theory is an emphasis on youth-oriented education. For example, education plays a key role in Lessig's lauding the fact that remix allows children to learn through materials they find particularly interesting, noting that "[w]hen kids get to do work that they feel passionate about, kids (and, for that matter, adults) learn more and learn more effectively."¹⁸⁴ This sharing helps develop cultural literacy and serves as a form of apprenticeship in which they actually learn more.¹⁸⁵ Although Lessig does offer a nod toward adult learning, his rationale applies with special force to the education of children.

Rebecca Tushnet similarly emphasizes education when enumerating the benefits of fan fiction. Fan fiction creates "a unique opportunity for learning, personal expression, and individual autonomy."¹⁸⁶ Participation also enhances health so "that we should encourage these

¹⁸¹ See *supra* note 166 and accompanying text.

¹⁸² Hellekson, *supra* note 162, at 115.

¹⁸³ See Fisher, *supra* note 71, at 1433–35; Tushnet, *supra* note 166, at 3–4.

¹⁸⁴ LESSIG, *supra* note 89, at 80.

¹⁸⁵ *Id.* at 81; see also *id.* at 27 (noting how John Phillips Sousa celebrated amateur musician ship "because it produced a musical culture: a love for, and an appreciation of, the music he re-created, a respect for the music he played, and hence a connection to a democratic").

¹⁸⁶ Tushnet, *supra* note 135, at 7.

kinds of social institutions for youth.”¹⁸⁷ Adapting preexisting stories also helps children develop cultural literacy.¹⁸⁸

To the extent that these rationales emphasize youth-oriented education, they impose natural limits on the scope of any reforms implied by the theory. They would provide less support for extending rights of access and dissemination to noneducational contexts.

3. Implicit Limits to the Rights of Access and Dissemination

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

For example, any right to create derivative works must be balanced against protecting the rights of the initial authors. For example, in recognizing that follow-on authors may make a sufficient contribution to justify trumping the interests of initial authors, both Kant and Hegel implicitly recognized that initial authors have personality interests that are not overcome until the interests of follow-on authors become sufficiently important.¹⁸⁹ Any other conclusion would sidestep the problems of giving exclusive primacy to the interests of initial authors only by falling into the opposite trap of giving exclusive primacy to the interests of follow-on authors.

The same could be said for any personhood-based right of dissemination. Recognizing that content must be shared with a community to be meaningful does not necessarily entail an unlimited right to disseminate. On the contrary, any such right would naturally be limited to the

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ GEORG FRIEDRICH VON HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* ¶ 69 (T.M. Knox trans., Oxford 1952) (1821); Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books*, in *PRACTICAL PHILOSOPHY* 23, 35 (Mary J. Gregor trans. & ed., 1996) (1785).

amount and the community needed for authorship to be meaningful. For example, while the role of the narratee and implied reader recognized by literary theory may require that the derivative work be read by someone in order to promote self-development, it does not necessarily require that the work be available to the broadest possible audience. Instead, the presence of competing interests dictates that the dissemination right would be limited to the smallest possible number of readers needed to allow the creative process to be self-actualizing. Similarly, any need to share creative works with a community would logically be limited to that community. It would not entail a right to disseminate works more broadly.

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

CONCLUSION

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

In this Chapter, I have argued that the conventional wisdom about personhood and copyright justifications suffers from some fundamental problems. Focusing on the connection between the author and the work adopts too narrow a vision of the ways that creative expression contributes to personality. It fails to recognize how the process of creation can play a role that can be as important as how works are treated once they have been created. In so doing, the

conventional wisdom adopts a view that focuses exclusively on initial authors without taking the interests of follow-on authors into account.

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

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