Part I, Chapter 1

Copyright Illustrated; Common Law Sketched*

This chapter offers a quick review of copyright law, illustrated with several figures, and an even quicker review of the common law, in just a few hundred words. The first section relates the standard account of copyright's ends and means, but adds several original portraits of copyright and its legal next-of-kin. The second section offers a quick sketch of the common law, describing how custom, courts, and commentary have together developed a few elegant rules that protect our persons, property, and promises.

I. Several Portraits of Copyright

This section views copyright from three perspectives, capturing its likeness in seven portraits. First, we trace copyright's path from a toll good, toward a public good, and—thanks to the Copyright Act[1]—back to a toll good. Next, we locate copyright on a map of IP, orienting it relative to patents, trade secrets, trademarks, and similar legal landmarks. Finally, we review the standard economic picture of copyright and update it to more fully capture copyright's unique features.

A. Copyright's Path

Works of authorship originate in private, safely kept under common law protections. Once published, however, expressive works become *data ferae naturae*—wild and natural information. As such, expressive works roam and reproduce freely. We sometimes capture expressions in copies, caging them in atoms or bits. But once we, the public, have experienced an expressive work, we tend to retain relatively cheap access to it. Or, rather, we *would* freely enjoy published expressive works if copyright did not intervene.

Copyright law limits public access to expressive works, herding them off of the commons and into private hands. The Copyright Act offers a sort of ranch to authors, giving them a place to birth, raise, and sell their expressive works, safe from the deprivations of grasping strangers. Authors enjoy those special privileges against other legal persons not as a natural right, but rather solely thanks to a public policy authorized by the U.S. Constitution and implemented through the Copyright Act. Figure [[cite]],

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* I for many years have distributed versions of "The Paths of IP" and "A Map of IP" to my students. Some of the economic analysis was first published as part of the draft book and then published in *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy,* 10 VANDERBILT J. ENT. & TECH. L. 841 (2008) (invited).

[1] Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2006 & Supp. V 2007).

below, illustrates the policy path that copyright, together with some of its legal next-of-kin, takes from its origins towards its goals.

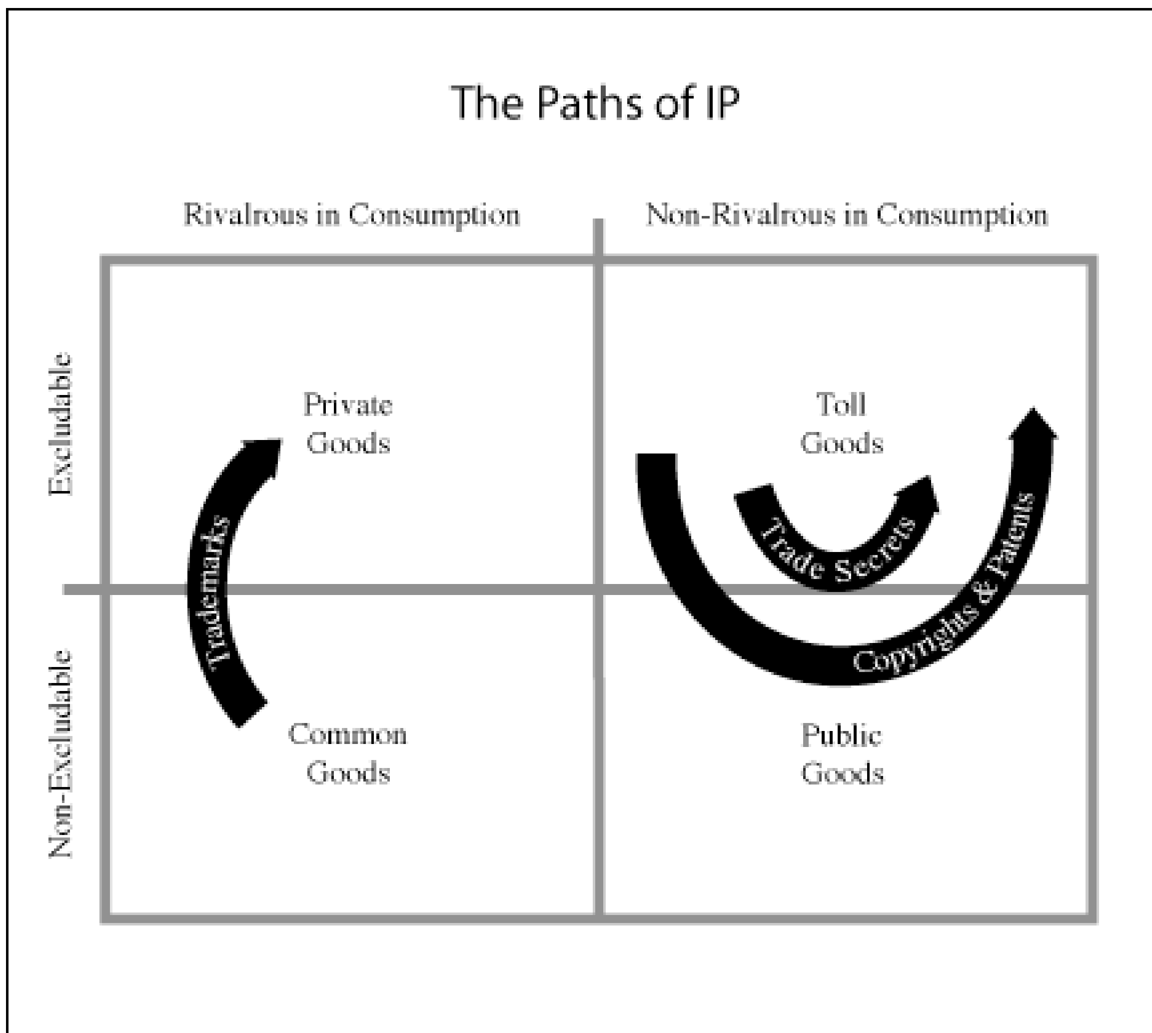

Figure [[cite]]

Figure [[cite]] offers a variation on economists' familiar four-fold classification of different types of goods. The table's rows indicate whether one who hold's a given good finds it cost-effective to fend off non-holders. Excludable goods, such as apples or clubhouses, readily admit to fencing. Non-excludable goods, such as the opens seas or a shared language, prove uneconomical to defend from unauthorized access. The table's columns indicate whether a good offers only one-time use or, instead, offers a flowing stream of shared benefits. A good qualifies as rivalrous in consumption when to enjoy it you have to extinguish it. When you eat an apple, for instance, you end up with only a core; feed your sheep on the village green and you leave less clover for your neighbors. In contrast, we can all enjoy a toll good (such as a cable TV transmission) or a public

good (such as broadcast TV signal) without exhausting it. Cross those two columns with those two rows and you end up with four types of goods.

Figure [[cite]] uses that four-fold table to portray how copyright and some related legal rights wend their way through public policy. Expressive works begin as toll goods, excludable but non-rivalrous in consumption. In other words, an author can at first keep others from consuming her expressions thanks merely to her common law tort, property, and contract rights. She can keep her works in private, under lock and key, releasing them only upon solemn oaths of secrecy. Those with whom she shares her work can enjoy it without decreasing her enjoyment of the same; she can sing her song or study her painting just as well if others enjoy their own copies. That marks her work, like other works of authorship, as non-rivalrous in consumption.

An author's expression retains its non-rivalry in consumption if he publishes the work. The work then tends to loses its excludability, however. Unless he were to somehow form and enforce a contract with everyone who encounters his published work, or protect it with technological locks—unlikely prospects, on most accounts—an author would have to rely on copyright to prevent others from accessing his works. Copyright steers published works back into toll good territory, empowering authors to assess fees and impose other limits on those who would use their works.[2]

Why does copyright policy follow that particular path? Though we might ask out of mere curiosity, in copyright's case we might also ask because we demand a justification. The privileges created by the Copyright Act, because they restrict non-authors from freely enjoying a copyrighted work, defy our natural and common law rights. Without copyright, after all, we could freely copy expressive works. Why, then, does copyright dare to restrict our liberty? Copyright negates the public good offered by expressive works in order to generate an even *greater* public good: the creation and distribution of new expressive works.

So runs the most popular justification for copyright. Copyright takes our freedom and gives us fees, licensing, and outright denial in return. But we, the people, arguably profit from that policy bargain, given that copyright encourages the production and distribution of new works of authorship. The Founders evidently thought that copyright offered a good deal for the fledgling United States, at any rate. Their Constitution specifically empowered federal lawmakers to enact "necessary and proper" legislation to "promote the general welfare" and "the progress of science and useful arts." The result: the Copyright Act.

In its most basic guise, the Copyright Act gives the author of a fixed work certain exclusive rights to use that work in certain ways. The exclusive rights created by the Act cover such things as the reproduction, public distribution, creation of derivative works, public performance, and public display of the work.[3] A copyright holder can treat those rights much like any piece of property, limiting access to them, selling them, or

[2] For more details about the chart, including discussions of trademarks, trade secrets, and patents, see the full version, available at www.tomwbell.com/teaching/IP_Paths.pdf.
[3] *See* 17 U.S.C. § 106 (setting forth the exclusive rights enjoyed by copyright holders).

abandoning them to the public.[4] And, like tangible property rights, copyrights may prove valuable.

What makes copyright's exclusive rights valuable? They grant to a copyright holder the privilege of directing state action against unauthorized users of a restricted work. With that grant of state power, a copyright holder can enjoin and extract money from infringing defendants. People respond to incentives. The threats of getting dragged into court, suffering fines and orders, and landing in jail suffice to discourage a great deal of infringement. Many would-be infringers instead become willing consumers of copyright-restricted music, books, movies, games, pictures, maps, computer programs, and so forth. Some of copyright's revenues trickle down to authors, rewarding their work and encouraging more.

Perhaps we cannot say of copyright policy, "Everybody's happy!" Still, though, it seems like a plausible and good faith attempt to protect us from a poverty of authorship. Copyright policy works imperfectly, granted, but it has hardly proven a disaster. Perhaps we don't need copyright. Handling expressive works solely with common law tools might prove both more equitable and efficient than relying on the Copyright Act. That remains a question of fact—one discussed throughout the rest of this book.

B. Copyright, Mapped

All copyrighted works originate as ideas, born when authors choose how to express themselves. The slightest exercise of discretion will suffice; just about anything more original than an alphabetical listing of names can qualify as copyrightable.[5] Once having crossed that low hurdle, it remains only for an author to fix her expression in a tangible medium for more than a transitory duration. She must, in other words, record her authorship. After thereby fixing her work—in words, music, pictures, computer code, architecture, or almost any expressive medium—she enjoys powerful legal rights grace of the federal Copyright Act.[6] Copyright thus inheres both in doodles and multi-million dollar movies, in works ranging in creativity from formulaic news blurbs to unprecedented paintings.

Those, copyright's fundamental features, mark it as a distinct legal species. Though laypeople often confuse copyrights with patents, trademarks, and other intangible goods, each of those related types of IP corresponds to a unique combination of subject matter and supporting law. Figure [[cite]] maps the location of copyright and other legal rights within IP's world.

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[4] See id. at §§ 201-05 (defining rules of copyright ownership and transfer).

[5] *See* Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc., 499 U.S. 340 (1991).

[6] Authors must register their works in order to vindicate their rights in court, however. 17 U.S.C. § 411.

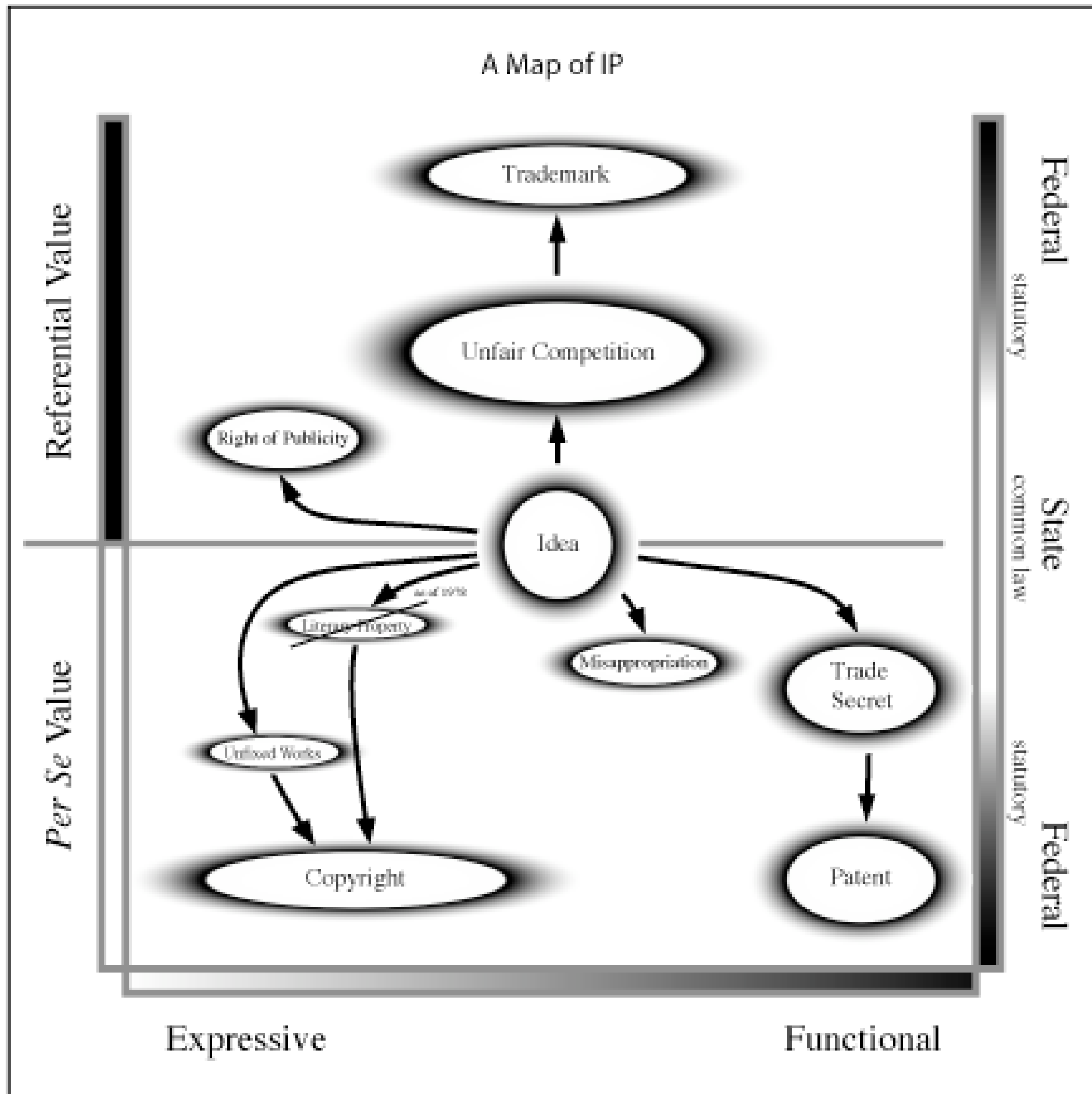

Figure [[cite]]

Rather than the points of a compass, figure [[cite]] maps several legal dimensions. The left vertical scale divides IP into two fundamentally different categories. IP above the horizontal divide, such a trademark, has value only insofar as it helps to identify other things of value. Below the divide, in contrast, falls intrinsically valuable subject matter. Ask yourself which type of IP you would want represented on a desert island; those you would choose—a copyrighted novel or a patented kayak, for instance—fall into "valuable *per se*" territory. The right vertical scale shows the source of a legal restriction. Towards the middle lies state common law, farther out lies state statutory law, and at the extremes lie federal statutory law. Unfair competition straddles all three categories, for instance, whereas copyright depends entirely on federal statutory law. The bottom horizontal scale indicates to what degree a particular kind of IP limits free use of expressive or functional

subject matter. Copyright stretches from poems to computer programs, for instance, whereas trade secret covers only commercially useful ideas.

The arrows on the map indicate how rights develop over time. Each sort of IP begins as an idea. From there, different types of IP move in different directions, depending on their subject matter. As a general matter, as the arrows move away from the center of the map, rights grow: more developmentally mature; more powerful; harder to obtain (because the requirements for protection become more stringent and formal); and more public and federal. Copyrights, however, move relatively quickly and easily from mere ideas to purely federal privileges.

Figure [[cite]] shows two possible precursors to copyright: common law protection of literary property or state statutory restrictions on unfixed expressive works. The former legal right expired as of January 1, 1978, when the Copyright Act preempted it,[7] and appears here solely as a historical marker. The latter legal right has won general recognition in California legislation, which offers copyright-like privileges for unfixed works of authorship,[8] and narrower recognition in New York, which has enacted criminal sanctions on fixing a public performance without permission and with the intention of profiting therefrom.[9] Neither common law literary property nor state statutes restrictng unfixed works offers much legal shelter. In most cases, therefore, ideas now speed directly to copyright without making any intermediary stops.

Notably, Figure [[cite]] does not include what some courts and commentators have called "common law copyright." The Supreme Court long ago established that U.S. copyright restrictions originate not in the common law but, "if at all, under the acts of Congress."[10] The common law did protect expressive works from unauthorized first publication, granted. That created only "literary property," however; something quite distinct, and distinctly weaker than copyright's exclusive publication rights.[11] Figure [[cite]] thus eschews "common law copyright" as a misleading label.[12]

The protean nature of the common law admits other interpretations of its scope, admittedly. New York courts have in recent years created—"recognized" would overstate the case, given that the courts did not claim to uphold any customary

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[7] *See* 17 U.S.C. § 301(a).

[8] *See* Cal. Civ. Code § 980(a). *See also id.* § 981 (providing for joint ownership of unfixed works), § 982 (providing for transfer of ownership in unfixed works).

[9] *See* N.Y. Penal Law §§ 275.15, 275.20. Though they do not expressly say as much, the criminal statutes of California and Illinois arguably speak with sufficient breadth to outlaw the same behavior. *See* Cal. Penal Code § 653h; Ill. Code Ann. § 5/16-7.

[10] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 663 (1834).

[11] *See* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1128 (1983) ("There is no historical justification whatsoever for the claim that copyright was recognized as a common law right of an author.").

[12] *See id.* at 1129-33; MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 2.02 (2007) (explaining that the common law's protection of authors' rights over unpublished works was "referred to somewhat inaccurately as common law copyright.") (footnotes omitted).

practice—a common law right against the unauthorized duplication of publicly-distributed sound recordings made prior to February 15, 1972, the date on which federal copyright first extended to such works.[13] The decisions of only one state's courts hardly suffice to define the common law, however, especially when all other states that have considered the question have reached a contrary conclusion.[14] It also remains a bit cloudy whether the common law's protection of literary property extends to unfixed works; several courts have denied that it does[15] while a few courts have hinted at a broader right.[16] With regard to these questions, as with regard to interpreting case law generally, it seems wisest to claim only the most widely respected legal principles as common law rights.

C. An Economic View of Copyright

Copyright, Justice Holmes explained, "restrains the spontaneity of men where, but for it, there would be nothing of any kind to hinder their doing as they saw fit";[17] namely, freely copying others' expressions. How can we justify that limitation? Courts and

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[13] *See* Capitol Records, Inc. v. Naxos of Am., Inc., 4 N.Y.3d 540, 560 (N.Y. 2005) ("[I]n the realm of sound recordings, it has been the law in this state for over 50 years that, in the absence of federal statutory protection, the public sale of a sound recording otherwise unprotected by statutory copyright does not constitute a publication sufficient to divest the owner of common-law copyright protection . . . .").

[14] *See* La Cienega Music Co. v ZZ Top, 53 F.3d 950, 953 (9th Cir 1995).

[15] *See* Rowe v. Golden W. Television Prods., 184 N.J. Super 264, 269 (App. Div. 1982) ("Common law copyright protection is afforded under New Jersey law to 'literary property' which . . . has been embodied in some 'material form.'"); Falwell v. Penthouse International, Ltd., 521 F. Supp. 1204, 1207 (W.D. Va. 1981) ("The existence of common law copyright protection for the spoken word has not been established by any court.").

[16] *See, e.g.,* Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 348 (N.Y. Ct. App. 1968) ("Conceivably, there may be limited and special situations in which an interlocutor brings forth oral statements from another party which both understand to be the unique intellectual product of the principal speaker, a product which would qualify for common-law copyright if such statements were in writing. Concerning such problems, we express no opinion; we do no more than raise the questions, leaving them open for future consideration . . . ."). *See also* NIMMER & NIMMER, *supra* note [[cite]] at § 2.02 ("The answer to that question [of protecting unfixed works at common law] is by no means free from doubt.").

[17] White Smith Music Publ. Co. v. Apollo Co., 209 U.S. 1, 19 (Holmes, J., concurring) (1908). *See also* Jane C. Ginsburg, *Copyright Without Walls*, 42 REPRESENTATIONS 53, 59 (1993) (Copyright law "has traditionally presumed a world in which, but for copyright, unauthorized reproductions would be pervasive and unremediable.")

commentators explain copyright as a response to market falure.[18] This section elaborates on that explanation, first offering the standard economic model of copyright and then amending it to describe the effects copyright infringement.

1. The Standard Economic Model of Copyright

Creating a work often costs an author a lot, whereas copying a work usually costs others very little.[19] Absent copyright, therefore, authors might find it discouragingly difficult to recoup the expense of creating fixed expressive works. The consequence: authors might under-produce expressive works and the public might suffer a poverty of expression.

To avoid that policy tragedy, the Copyright Act empowers authors to control certain reuses of their fixed expressive works. By selling those special statutory privileges, authors can offset their production costs. Thus does copyright arguably do what the common law allegedly cannot: ensure that the public enjoys an adequate supply of expressive works.[20]

The benefits of copyright policy come at a price, however. Although it may cost a great deal to make the first copy of a fixed expression, it usually costs very little to make and distribute subsequent copies. Absent copyright's restrictions, those works would constitute public goods.[21] Copyright, in other words, bars the public from freely enjoying the very goods bearing its name: "public goods."[22] Instead, the Act vests copyright holders with the power to charge whatever the market will bear to escape liability for infringement. Though the monopoly rents that copyright holders thereby win allegedly provide a necessary stimulus to creativity, non-holders suffer the opportunity costs of losing cheap access to fixed expressive works.[23] Most commentators thus

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[18] *See* Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 758-59 (2001) (collecting citations).

[19] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). This admittedly explains legislators' motives only *post hoc*, and thus serves as a sort of apology for more the likely, public choice analysis.

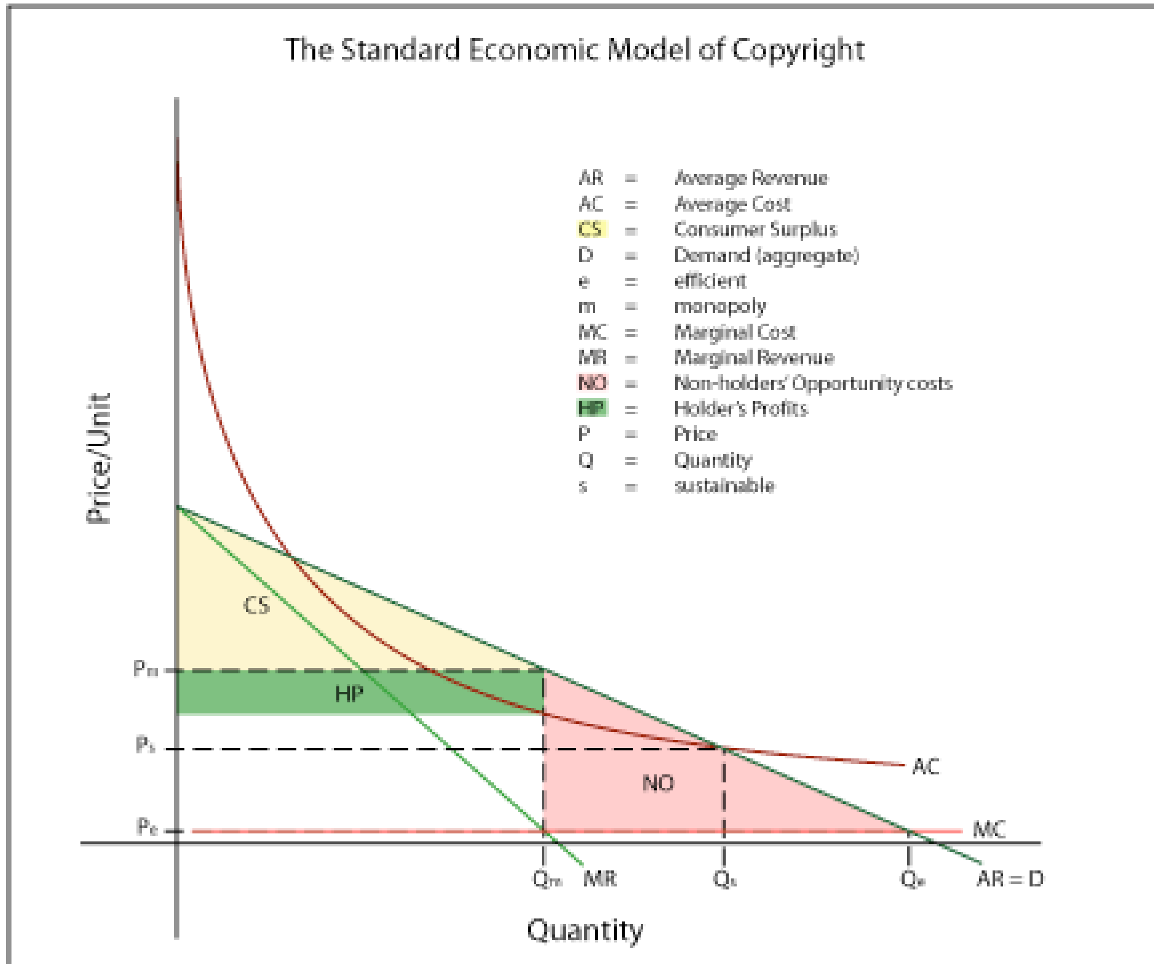
[20] The Copyright Act covers only *fixed* expressive works, granted. *See* 17 U.S.C.A. § 102(a). It doubtless stimulates the production of unfixed works indirectly, however, as when a jazz musician extemporizes during a performance in order to convince listeners to buy a recorded version of the unfixed work.

[21] *See* Landes & Posner, *supra* note [[cite]] at 327.

[22] That label hardly suffices to establish the proper scope of copyright, of course; I intend no more than irony.

[23] Commentators often refer to this a "deadweight loss." *See, e.g.,* William W. Fisher III, *Property and Contract on the Internet*, 3 CHI.-KENT L. REV. 1203, 1236 (1998); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1801 (2000). To clarify the cause of that loss, I prefer the label, "non-holders' opportunity costs."

understand copyright policy to aim at striking a balance between giving authors sufficient incentives to create expressive works and providing the public with adequate access to the works thereby created.[24] Figure [[cite]] illustrates that, the standard economic model of copyright policy.[25]



[24] *See, e.g.,* Landes & Posner, *supra* note [[cite]], at 326 (characterizing this as "the central problem of copyright law."). *But see infra*, chapter [[cite]] (arguing that copyright policy cannot strike a delicate balance between public and private interests); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. LAW REV. 212 (2004) (arguing the economics of product differentiation suggest that the access-incentives tradeoff is not so intractable as generally believed).
[25] This portrayal of the standard model comes largely from Yoo, *supra* note [[cite]], at 227 fig. 1, which both sums up the traditional view among legal academics of the economics of copyrights and corrects it by setting the proper bounds for measuring profit. The chart here differs from Yoo's, however, in showing average costs to exceed average revenue at low levels of production. That assumption, while not strictly necessary, doubtless describes most copyrighted works more accurately.

Figure [[cite]]

As portrayed in figure [[cite]], an author incurs large costs upon creating a fixed work but very low marginal costs of production (MC) thereafter. The author's average costs of production (AC) thus drop with each additional copy he—or, more likely, the party to whom he sells his copyrighted work—produces. He faces the usual sort of downward-sloping aggregate demand curve (D), which also marks the average revenue (AR) he can make by selling any given number of copies.

How many should copies should he sell? Were social efficiency the test, he would sell the quantity (Qe) corresponding to the point where his marginal cost curve crosses the demand curve, earning the corresponding price (Pe). But that would discourage him (and other would-be authors) from creating fixed expressive works, as it would not allow him to recover his average costs. For him to break even in the authorship business, he would need to sell at least the quantity corresponding to the point where his average cost curve crosses the demand curve (Qs), thereby earning a sustaining price (Ps). Happily for him, though, the monopoly privilege afforded by copyright law allows him, at least in theory, to sell even fewer copies (Qm), and at a higher price (Pm). Specifically, he will want to sell a quantity that corresponds to the point where his marginal revenue (MR) curve crosses his marginal cost curve. At higher quantities, his marginal costs would exceed his marginal revenues, giving him marginal losses.

If our hypothetical author manages to sell at the monopoly quantity and price that maximizes his benefits, he will earn profits (HP) equal to the amount his revenue exceeds the amount necessary to recoup his average costs. In that event, consumers to whom he sells will enjoy a surplus (CS) representing the different between what they pay and how much they value his work. Non-holders unwilling to pay what he demands, however, will suffer opportunity costs (NO) equal to how much they would have paid for the uses barred by his assertion of copyright.

We could doubtless say more about that, the standard economic model of copyright, adding complications,[26] quibbles,[27] and criticisms.[28] I will, below, in explaining why we stand a good chance of outgrowing copyright.[29] For now, though, let us assume that Figure [[cite]] offers a conventional and useful economic model of copyright.

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[26] I considered, for instance, adding a variety of average cost curves to illustrate how works with different production costs fare under a given level of copyright restriction.

[27] *See, e.g.*, William W. Fisher III, *Property and Contract on the Internet*, 3 CHI.-KENT L. REV. 1203, 1238-39 (1998) (arguing that price discrimination can both increase copyright holders' profits and decrease non-holders opportunity costs).

[28] *See, e.g.*, Yoo, *supra* note [[cite]], at 231-35 (criticizing the standard model as deficient on a number of grounds).

[29] *See infra*, Part [[cite]].

2. The Specter of Copyism

On the standard economic view of copyrights, as on the economic view of other monopolies, average revenue equals demand. Those two measures trace one and the same line. Why? Because for most products and services, consumption closely matches supply at the market-clearing price. Sales reveal consumer demand and, in the case of copyright and other supposed monopolies, only one seller reaps revenue from those sales. Thus, for instance, a utility's average revenues faithfully track the aggregate consumer demand for electric power.

Even a so-called monopolist might face competition, however. An electrical utility might for instance suffer theft from unauthorized taps on power lines, competition from home-generated electricity, and exit to gas appliances. So, too, might the sole authorized seller of hard liquor fail to capture the entire market of drinkers, losing some to the resale of stolen goods and others to hand-brewed moonshine.

The caveats to "monopoly" prove especially strong in the case of copyright, which permits some uses of privileged works, such as fair uses, that copyright holders do not authorize, and which fails to prevent many uses, such as infringing ones, that copyright law expressly forbids. We might fairly say that the former category of uses, because copyright holders have no statutory power to bar them, do not really cut into the market share for a copyrighted work. Copyright holders cannot lose what never have, on that view. I here thus focus on infringing uses. The general point stands, however: Due to consumers' unauthorized uses, a copyright holder never commands all of the market for an expressive work.

That conflict between copyright law in theory and copyright use in facts shows why we should perhaps eschew calling copyright a monopoly and instead talk about copyright in terms of market power.[30] Whether or not it hands out monopolies, after all, the Copyright Act *does* give a powerful subsidy to those it favors: the privilege of invoking State power to inhibit infringing uses of expressive works. The standard economic model of copyright usefully captures that effect, but somewhat exaggerates it. We can get a more accurate picture of copyright by splitting consumer demand from average revenue.

The consumption of an expressive work—and thus the revealed demand for it—may greatly exceed the supply legally permitted under copyright law. Effectively, some consumers treat copyrighted works like public goods, paying only the very low marginal costs that they must bear to enjoy each unauthorized use. Consumers typically pay those costs not in cash but in opportunity costs—the time and effort of copying. At all events, none of that payment goes to copyright holders, leaving them legally wronged, possibly aggrieved, and sometimes litigious. But copyright holders seldom find it worthwhile, or even possible, to fully defend their statutory privileges. Many infringing acts go undetected or for other reasons elude enforcement. Figure [[cite]] illustrates that phenomenon, showing how in the case of a copyrighted work aggregate consumer demand might diverge from the copyright holder's average revenue.

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[30] *See* DAVID D. FRIEDMAN, PRICE THEORY: AN INTERMEDIARY TEXT 244-45 (South-Western Publ. Co. 1986) (explaining the ubiquity of monopolistic competition).

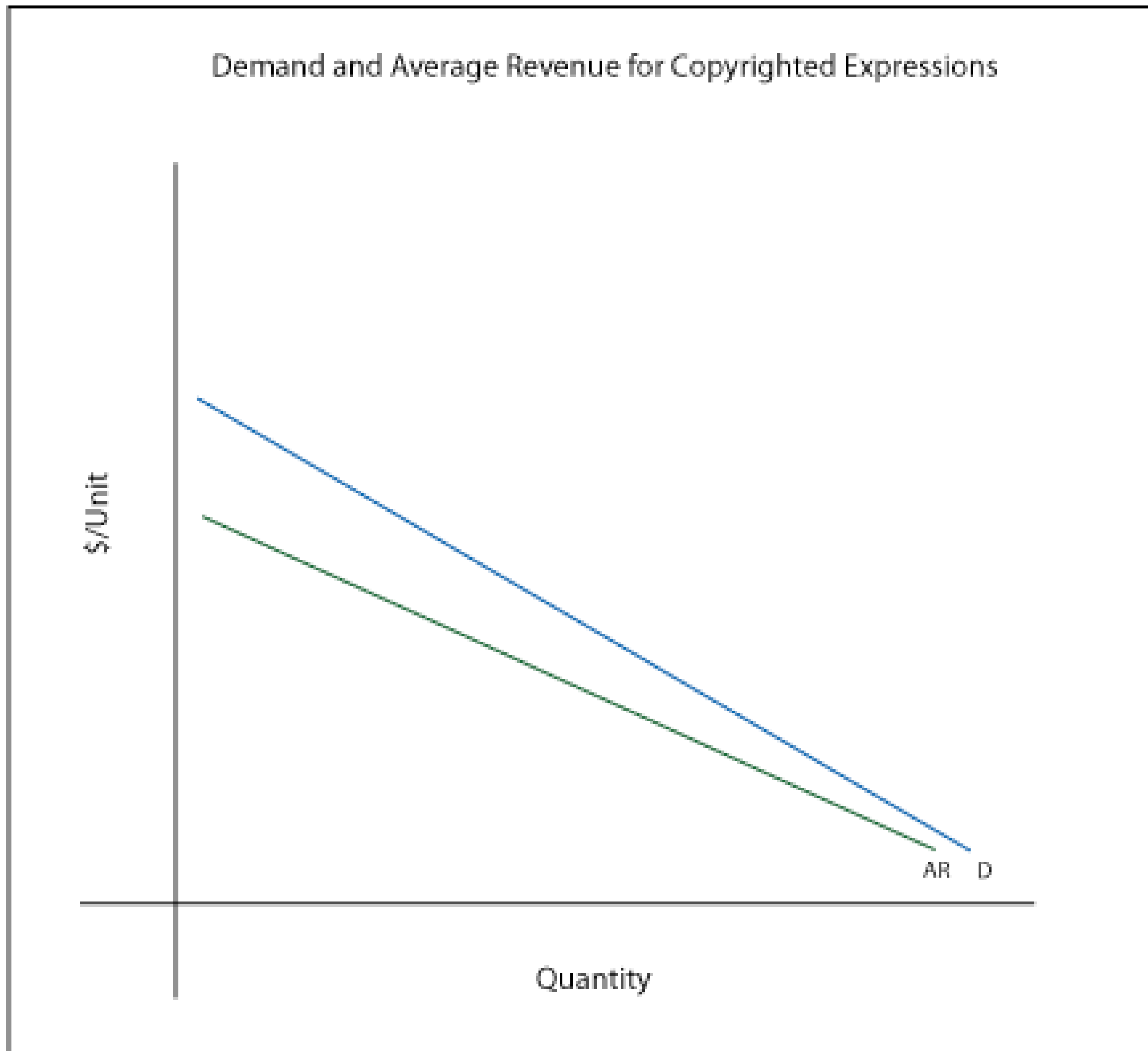

Figure [[cite]]

Copyright holders understandably object when, due to infringement, they earn less revenue than the law entitles them to. But why should the rest of us care? Recall that copyright aims to cure a looming market failure: we will suffer an undersupply of expressive works if authors cannot recoup their production costs. Copyright aims to cure that failure by giving authors the privilege of controlling, and thus profiting from, certain uses of their works. Infringement threatens to upset that statutory mechanism, depriving authors and their transferees of revenue that might otherwise stimulate the production and distribution of expressive works.

We might call that threat, after Marx and Engels, "the specter of copyism."[31] And, as the allusion to communism suggests, we should all worry that poverty will follow if production does not pay. In the case of copyright policy, in other words, we should worry that infringement will decrease copyright holders' revenues below the level necessary to sustain authorship. As figure [[cite]] illustrates, that threatens to deprive the public of new expressive works.

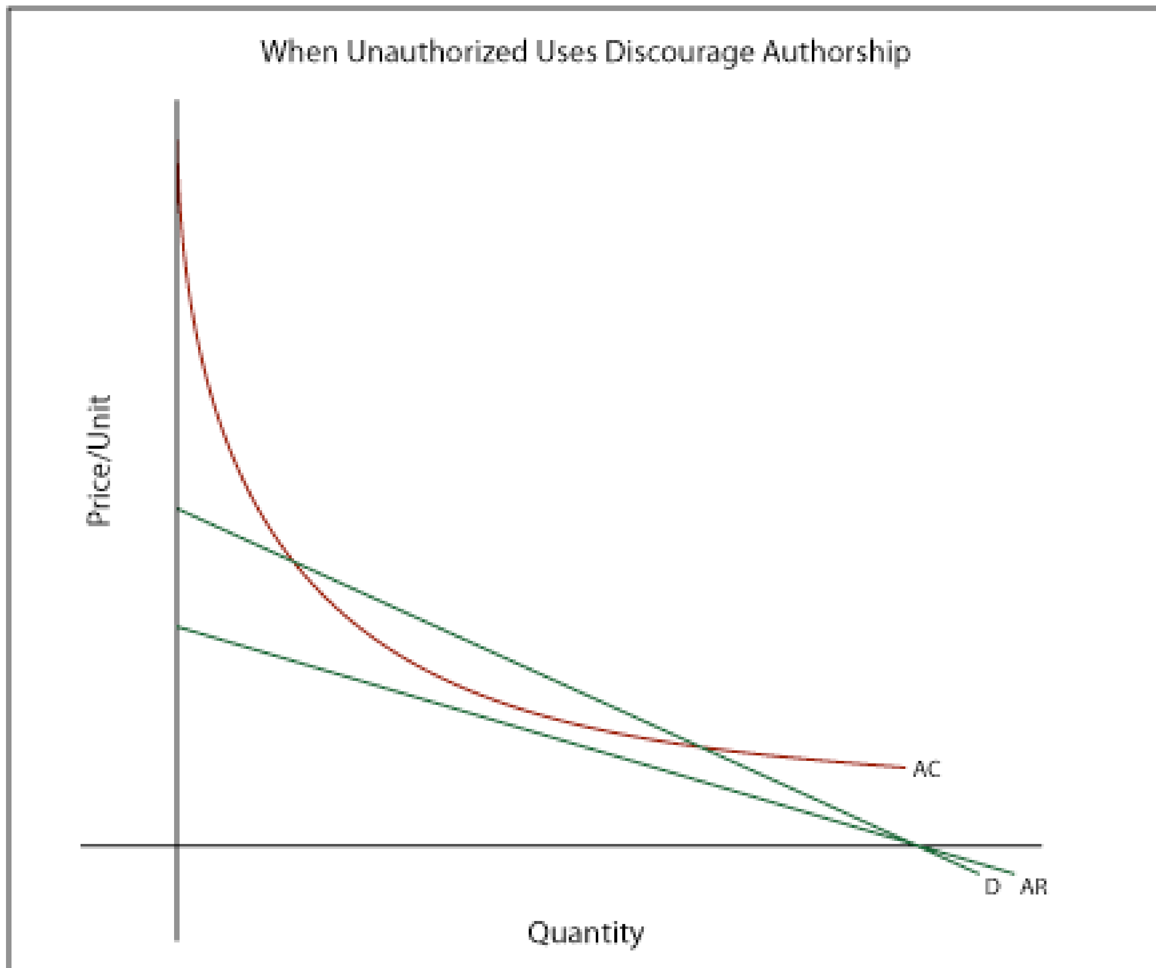

Figure [[cite]]

As figure [[cite]] indicates, infringement threatens to drive a wedge between aggregate consumer demand for a work (D) and the average copyright revenue generated by the work (AR). Depending on the work's average cost curve (AC), infringement might thereby stymie the production of original expressive works. A copyright holder

[31] *See* KARL MARX & FRIEDRICH ENGELS, *Manifesto of the Communist Party* (1848), *reprinted in* THE MARX-ENGELS READER 469, 473 (Robert C. Tucker ed., 1978).

might not find it worthwhile to produce a work absent the prospect of recovering at least her average costs. A profit-seeking copyright holder would thus avoid the market pictured in figure 3—even though consumers would willingly expend more than the work's average cost to have it. Thus might the specter of copyism curse us with market failure.

3. Discouraging Just Enough Infringement

While rightly shuddering at specter of copyism, we should also recognize that the unauthorized use of copyrighted works can, if it does not go so far as to undercut authors' incentives, increase social wealth. Consider, for instance, an impoverished entrepreneur relying on pirated software to start her business. If she could not afford to buy an authorized copy, and if her unauthorized use would not depress software production, her infringement would generate a welcome consumer surplus. The same would hold true of, say, someone who enjoys an infringing copy of a CD despite being unwilling to pay its retail price.[32] As figure [[cite]] illustrates, those exceptions to the strict enforcement of copyright law could in theory benefit us all without discouraging the production and distribution of expressive works.

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[32] Both examples assume that the copyright holder does not price discriminate sufficiently well to offer a market for such unpaying uses.

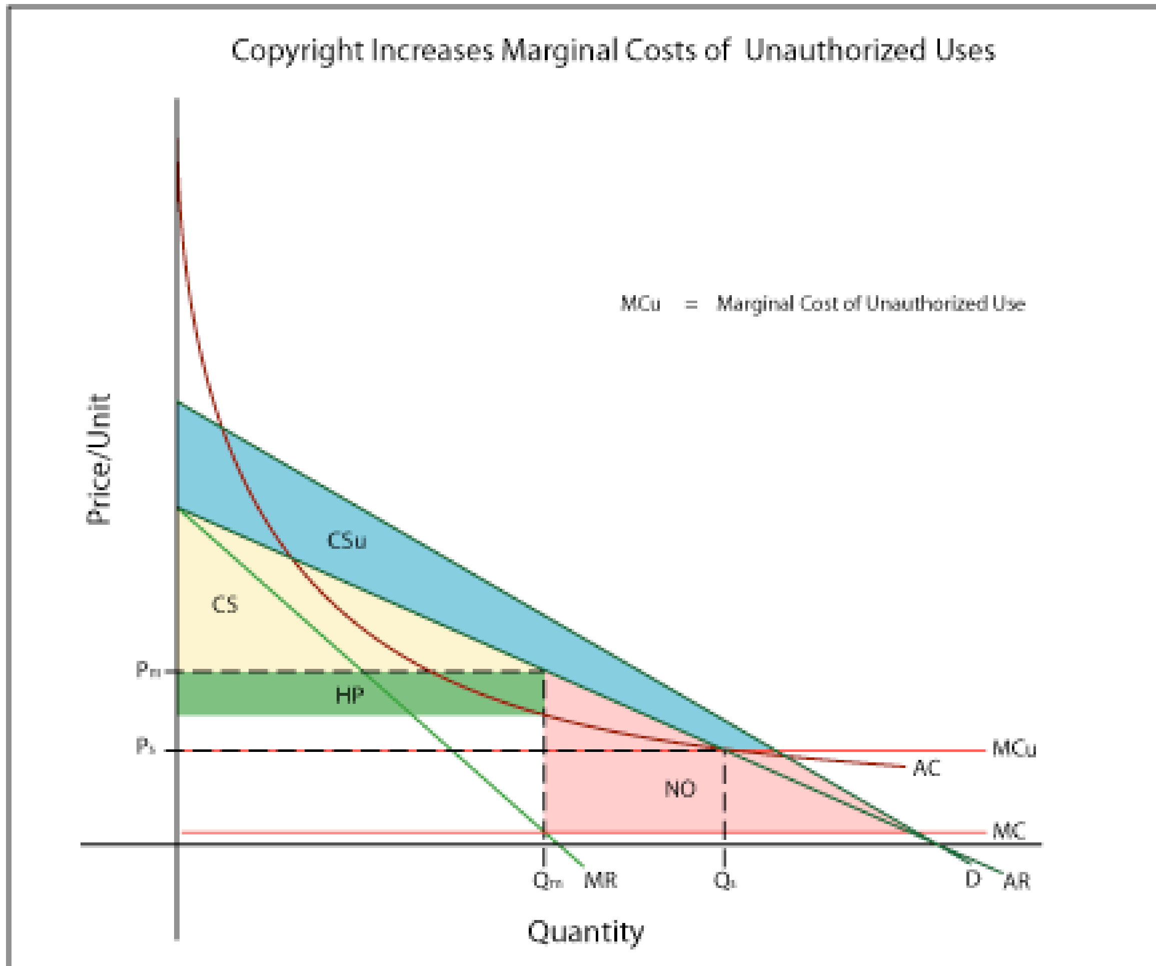

Figure [[cite]]

In Figure [[cite]], we see unauthorized and unpaying uses effectively competing with revenue-generating uses that respect copyright. Authorized users of the work pay the copyright holder price Pm to enjoy the work. That prices some law-abiding customers out of the market—those non-holders who forego the work rather than infringe it. They suffer the opportunity costs marked by area NO. Those sorts of economic and legal constraints do not trouble unauthorized users, however. They pay for the work not via copyright's toll, but rather by taking a path around the law. Those unauthorized users typically do not have notable fixed start-up costs; they basically pay only their marginal costs (MC) to access copyrighted works. Those outlaws typically do not pay in coin, but rather in terms of time, effort, and risk. The surplus gains of such unauthorized uses thus fill the area below the aggregate demand curve (D) and above the average revenue curve, AR, all the way down to where D crosses MC.

The large consumer surpluses in figure 6 look appealing, especially since they co-exist with copyright holders' monopoly profits. Figure [[cite]] surely offers too sanguine a view of the effects of copyright infringement, however. Without the limitations imposed by copyright law, some consumers who would otherwise willingly pay for

authorized uses might instead opt to save their money by joining the unpaying masses of *un*authorized users. The resulting exodus, from respecting copyright to infringing it, would risk decreasing the revenues afforded by copyright, bringing about the policy tragedy portrayed in figure [[cite to figure before last]]. Why? Because the market described in figure [[cite]] would not generate enough revenues to support the monopoly price (Pm) for the monopoly quantity (Qm). Under competitive pressure from unauthorized uses, the demand curve for the authorized uses of the work would sink. If any copyright holders remained in such an unremunerative market, they would eventually find that they could sell their works only at their marginal costs. The specter of copyism would stir.

How does copyright law dispel the looming threat of copyism? By imposing high marginal costs on infringing uses of privileged works. Absent the Copyright Act, and especially in digital works, an infringer would generally face the same low marginal reproduction costs as a copyright holder.[33] Thanks to the Copyright Act, an infringer might have to pay actual or statutory damages, lost profits, costs, and/or attorney's fees to a copyright holder for every unauthorized use.

How high should lawmakers set the marginal costs of infringement? We would not want them to under-deter it, lest the specter of copyism become all too real. Nor would we want them to over-deter impermissible uses, given that a modest level of infringement can deliver social gains. Theory suggests that lawmakers should set the marginal costs of infringement, taking into account that only some infringing uses get caught and litigated, just high enough to ensure that authorized users will have no incentive to opt for paying less than enough to sustain authorship. In other words, lawmakers should set the marginal costs of unauthorized uses (MCu) equal to a price just sufficient to sustain authorship (Ps). Figure [[cite]] illustrates.[34]

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[33] That holds especially true of digital works. Works in other media may prove more difficult to copy without authorization. Now-justice Breyer described such an effect in the book publishing industry. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

[34] Landes and Posner offer an economic model of copyright in which the marginal costs of "copiers" slightly rise with the number of uses. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 71-72 (2003). That certainly seems likely with respect to some infringing copiers, given that larger copying operations tend to run greater risks of detection and prosecution. With regard to distributed mass infringement, however, individual copiers may find safety in numbers. Remaining uncertain how those and other effects might in practice affect the slope of the MCu curve, and preferring theoretical simplicity to actual error, I here show MCu as level.

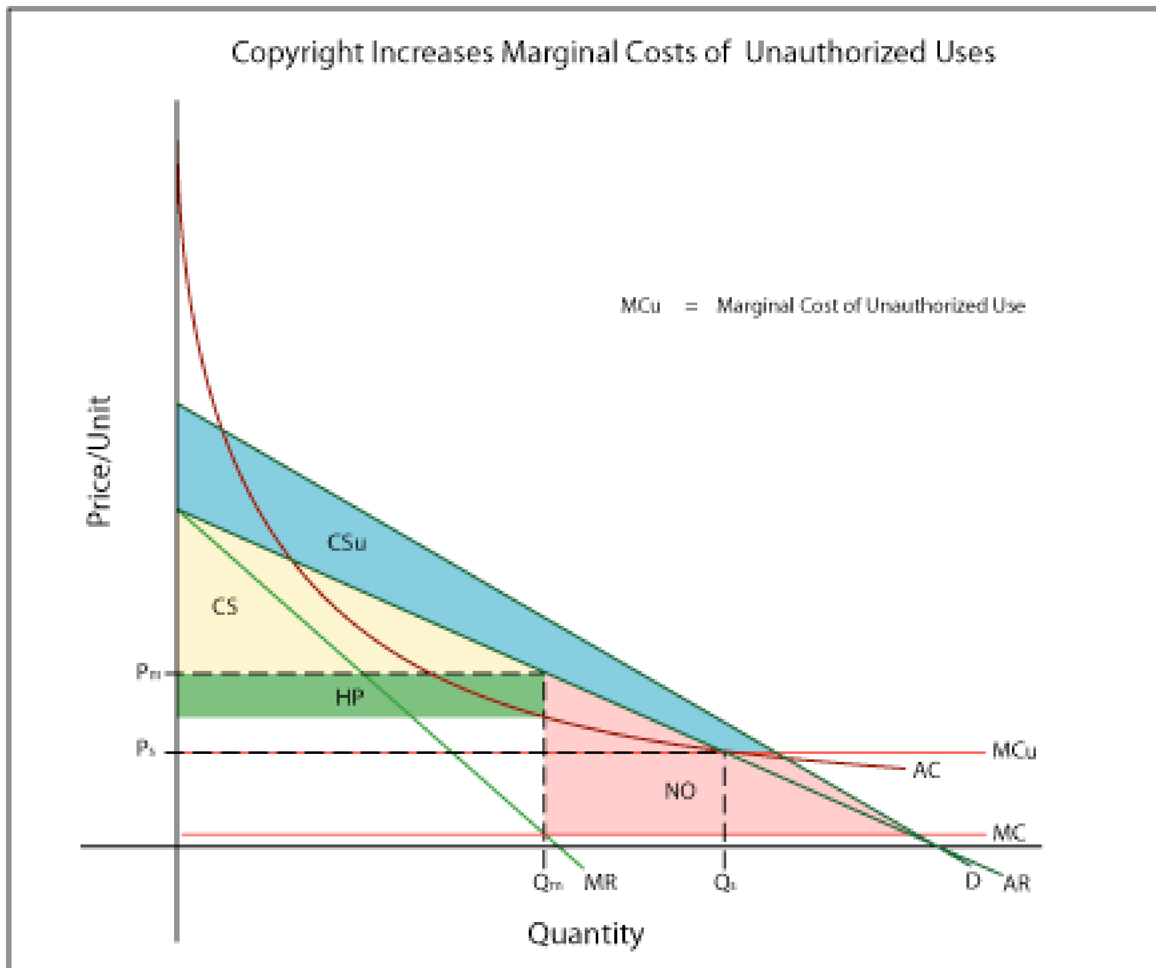

Figure [[cite]]

The story does not end with figure [[cite]], however. Even after the law artificially inflates the marginal costs of infringing copyrighted works, we would still see consumers migrate from authorized uses to unauthorized ones. The market-clearing price for a work would thus tend to settle very close to the marginal cost of infringing the work. Authorized and unauthorized uses of the work effectively compete, after all. Where the law sets the costs of infringement determines how much copyright holders stand to earn by enforcing statutory privileges and, indeed, whether enforcing those privileges offers any net gain at all. Where, then, should lawmakers set MCu?

Copyright policy should not aim to price all unauthorized uses out of the market. The unauthorized uses that it does allow will, granted, decrease copyright holders' profits. Copyright policy rightly aims at affording copyright holders only just enough revenue to cover their average costs, however. Any amount above that level unjustifiably runs up non-holders opportunity costs, sacrificing the public good. Pricing the marginal costs of unauthorized use at a level sufficient to allow copyright holders to recoup their average costs, in contrast, will tend to encourage consumers wavering at the margin between authorized and unauthorized uses to opt for authorized ones. Over time, in the main, and

holding all else equal, we should expect copyright holders' revenues to drop. Eventually, copyright holders would enjoy no monopoly rents; they would have to sell immunity from the exercise of their statutory privileges only at sustainable prices. Figure [[cite]] illustrates.

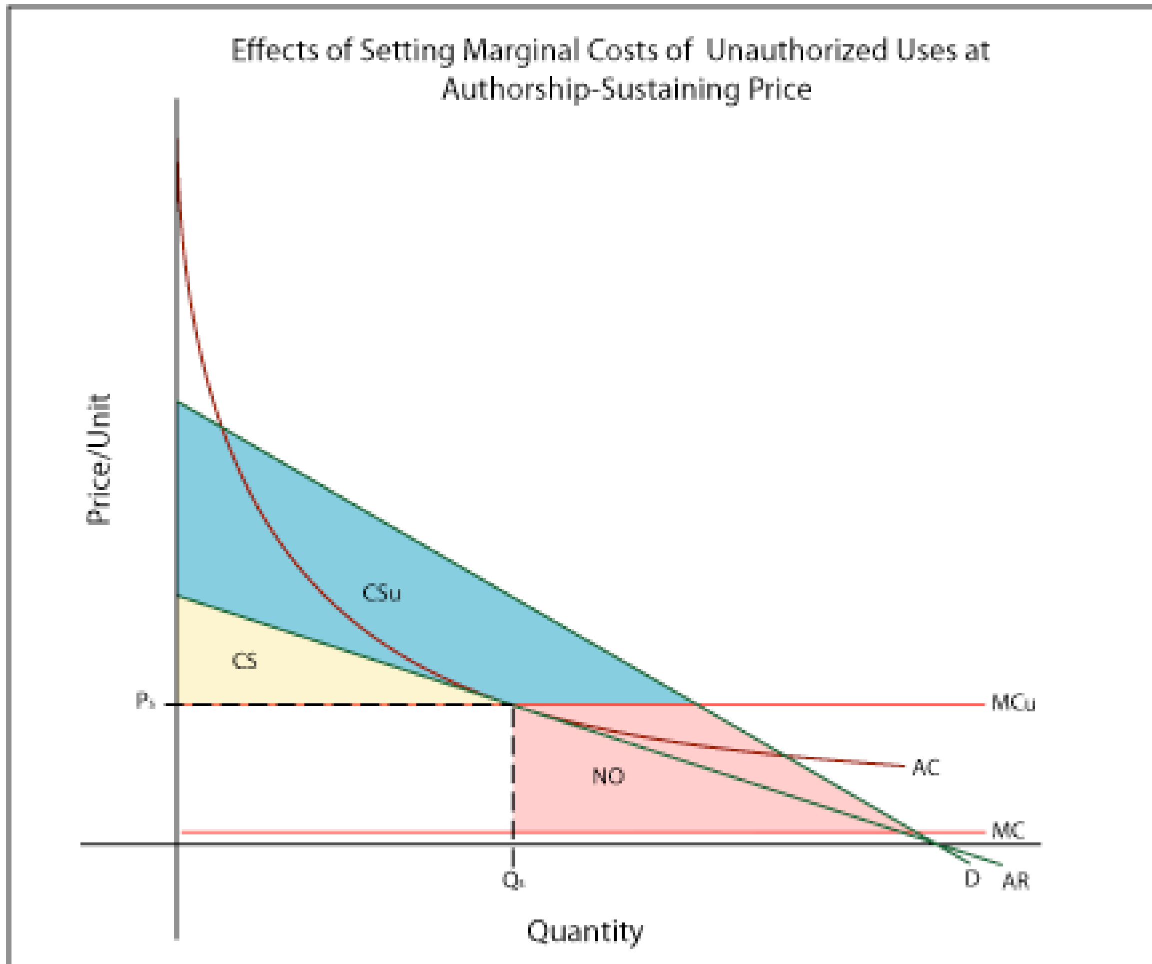

Figure [[cite]]

Comparing Figure [[cite to figure before last]] with Figure [[cite to above figure]], we see that competition from unauthorized uses of the copyrighted work in question has pushed the average revenue (AR) curve backwards and down. In figure [[cite to above figure]], where consumer demand (D) exceeds the marginal cost that copyright law imposes on unauthorized uses of the work (MCu), consumers rationally disregard copyright law. By instead opting to engage in unauthorized uses of the work, consumers enjoy large surpluses (CSu). Consumers who respect copyright law, but who value the work at greater than its market price, also enjoy surpluses (CS). Copyright holders caught in the world portrayed by Figure 8 no longer extract monopoly profits; instead, they find that the market supports sales at a quantity (Qs) and price (Ps) only just

sufficient to recoup the average costs (AC) of producing the work. Even at that low price, copyright enforcement still imposes opportunity costs (NO) on non-holders who would have paid less for the work That constitutes a necessary evil, however, given that a lower price would leave copyright holders unable to recoup their costs and, thus, unwilling to supply the market for expressive works.

So, at least, goes copyright in theory. In practice, as discussed in chapter 4, lawmakers lack both the information and incentives to calibrate copyright policy so precisely or so well. These economic models thus only explain how copyright law *should* work—not how it *does* work. And, given how copyright policy does work—as a necessary evil, at best—we would best serve the general welfare by encouraging the development of alternative mechanisms, based not in statutory law but in common law, for promoting the production and distribution of original expressive works.[35] We should, in other words, try to escape copyright.[36]

II. A Birdseye View of the Common Law

Arthur R. Hogue cautioned, "The greater a man's knowledge of the law, the more hesitantly he will be in answering the question: What is common law?"[37] He spoke well. The common law resists a hard, fast, and comprehensive definition. Like a vast and rugged mountain range, it offers many vistas. Hogue saw the common law as a creature of medieval royal courts,[38] whereas others regard it as any judicial pronouncement of non-statutory law.[39] I view the common law from a slightly different angle: As a development of custom, courts, and commentary that has generated rules protecting our persons, property, and promises.[40]

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[35] *See* BELL, *supra* note *, at ch. 7.

[36] Given that the prevailing defense of copyright casts it as a response to market failure, common law generally stands accused of doing too little to promote authorship. Perhaps, though, we should worry that common law might do its job too well, over-protecting intangible goods and so decreasing the public good. So far, at least, it does not appear that the Supreme Court thinks that problem looms. *See* Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979) (holding that enforcement of a contract requiring royalty payments for unpatented invention did not contravene federal policy).

[37] ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 5 (Indiana Univ. Press 1966).

[38] He defined it as "a body of general rules prescribing social conduct, enforced by the ordinary royal courts, and characterized by the development of its own principles in actual legal controversies, by the procedure of trial by jury, and by the doctrine of the supremacy of law." *Id*. at 190. Strike "royal," and you'll find Hogue's definition entirely compatible with my own.

[39] *See, e.g.,* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 247 (1990) (defining the common law as "any body of law created primarily through judges by their decisions rather than by the framers of statutes or constitutions.").

[40] I daresay that definition, despite my perhaps idiosyncratic phrasing of it, conforms to standard views of the topic. Black's Law Dictionary, for instance, gives as its first

On that view, common law originates in custom, wins recognition in courts, and develops in commentary. Custom naturally comes first.[41] It long ago gave rise to a set of social practices, such as avoiding bloodshed, honoring borders, and upholding oaths, that permit us to live in peace and prosperity. Referring to those and other customs helps common law courts to resolve our disputes justly. A judge might for instance determine reasonable conduct in a tort case by looking to community standards,[42] award legal rights to someone who has long and openly used property entitled to another,[43] or interpret a contract's language by light of trade usage.[44] In these and other ways custom inspires—if not mandates—the common law. Commentators, looking back over many court decisions and across many years, help us to follow the common law's meandering path, explaining and rationalizing its wanderings. The common law thus develops from custom, through courts, and to commentary. Figure [[cite]] illustrates.

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definition of the common law, "the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity . . . ." BLACK'S LAW DICTIONARY 276 (6th ed. 1990).

[41] *See* FRIEDRICH A. HAYEK, I LAW, LEGISLATION AND LIBERTY ch. 4 (Univ. of Chicago Press 1973) (describing the origins of the law *qua* nomos).

[42] *See* RESTATEMENT OF TORTS (2ND) § 295A (1965) ("In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account . . . .").

[43] *See* Restatement of Property § 458 (1944) (defining adverse use).

[44] *See* Restatement of Contracts (2nd) (1981) §§ 219 (defining "usage" as "habitual or customary practice"); 220 (specifying when usage shapes interpretation of an agreement); 221 (specifying when usage supplements or qualifies an agreement).

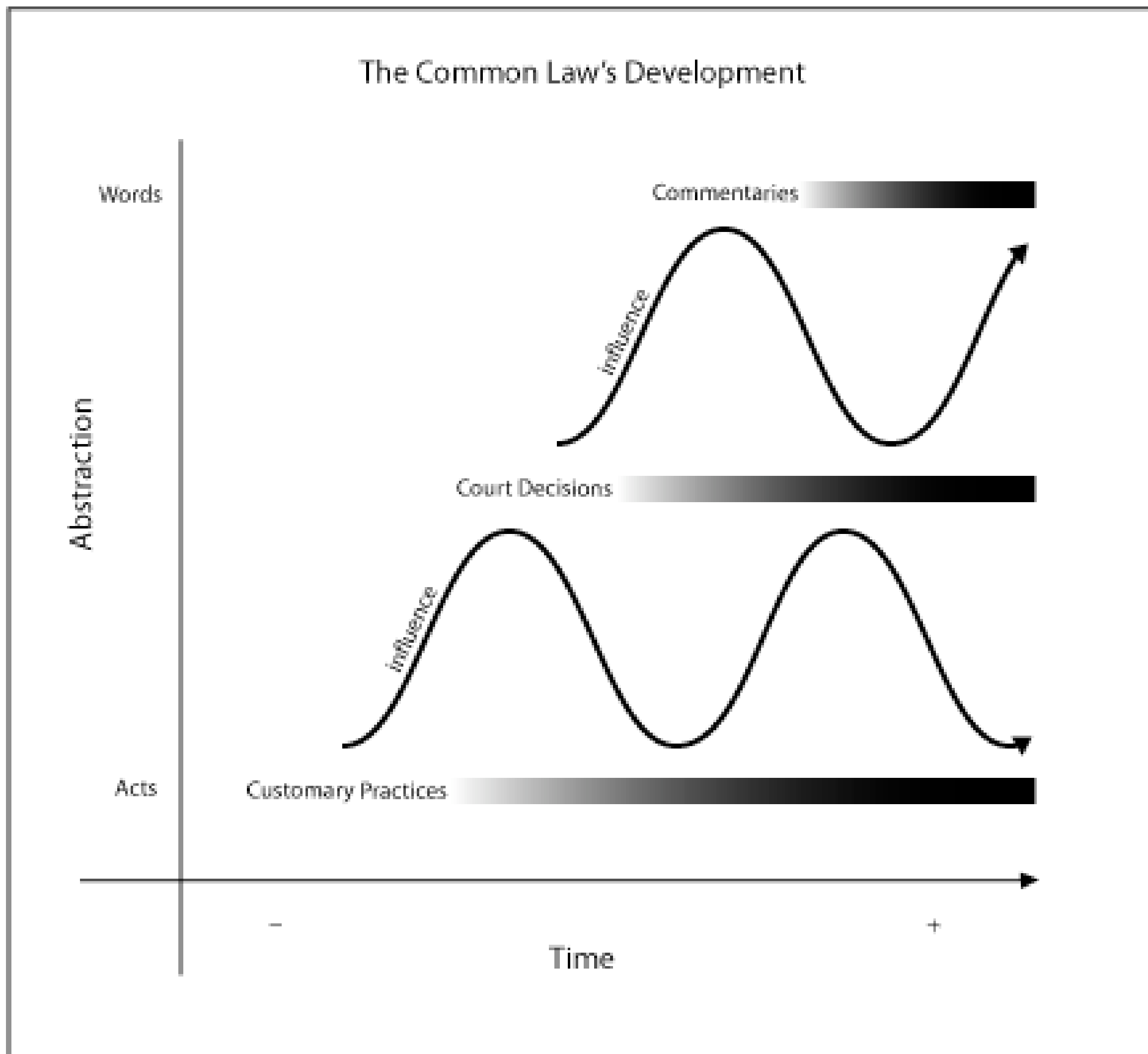

Figure [[cite]]

Figure [[cite]] traces the common law's origins from unarticulated customary practices, found in actions but not words, through the powerful speech of courts administering justice, to purely verbal commentaries on the law. Up to a point, then, the common law grows upward towards increasing abstraction over time; hence the initial upward cast of the arrows of influence laid out in figure [[cite]]. The forces driving the common law's development flow downward, too, though, toward more concrete results. Legal commentary sometimes persuades a judge, balanced on the cusp between two plausible claims, to choose one over another. Legal decisions sometimes affect customary practices, as when courts clarify that no person can own another. The threads of custom, court, and commentary thus intertwine, weaving over time the tapestry of common law. That offers a somewhat idealized picture, granted, and one far removed from the nitty gritty of real world litigation. What figure [[cite]]'s satellite view of the common law lacks in detail, however, it makes up for in comprehension.

At its most basic and elegant, the common law comprises just a few, simple rules.[45] "Aggress only in self-defense, do not trespass, and keep your word," it directs. Even more succinctly: "Respect persons, property, and promises." We find it convenient and useful to follow those rules. They seem *natural* to us. They should; they have evolved alongside us in the long journey from tribes, through kingdoms, and to states. They will doubtless continue to follow, and indeed *promote*, our social progress.

Rather than simply inventing it out of whole cloth, courts have helped to develop the common law by deciding how customary rules apply to particular disputes. In their collective wisdom, over hundreds of years, judges and commentators in Britain, the United States, and other common law countries have refined the principles of tort, property, and contract law. They have bequeathed to us a detailed set of time-tested and mutually compatible rules, well chosen to safeguard our peace and prosperity.

Nobody planned that happy outcome. The common law instead evolved spontaneously, developed over the ages and tested in countless conflicts, to protect our persons, property, and promises. Tort law, property law, and contract law do the heavy lifting. Beyond that, the core of common law, bloom a variety of supporting sub-orders. We can fairly describe the rules of wills, trusts, and estates as a specialized part of the common law, for instance. Ditto the common law rules of agency and restitution.

We find those, the rules of common law, initially in customary practices and then later in courts' decisions. Commentators, in treatises and restatements of the law, summarize, clarify, and systematize the common law's rules.[46] By diligently studying those various sources we might discover the tort, property, contract, and other rules that together make up the common law. Notably, that effort will not lead us to copyright.

Conclusion: Looking Beyond Copyright

Because it originates in our customs, the common law naturally fits our social needs. Its rules for respecting persons, property, and promises give us a necessary framework for civil life. Perhaps those rules could provide us with sufficient legal framework, too. That remains an open question, and one that we would do well to consider seriously.

It looks likely, for instance, that tort, property, and contract law suffice to encourage *some* authorship. An author can use property law and tort law to keep his draft

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[45] On Richard A. Epstein's account, our complex world relies on six simple rules. Five of these—self-ownership, the right of first possession, voluntary exchange, protection against aggression, and a limited privilege based in necessity—come from the common law. The sixth—requiring just compensation for public takings of private property—comes from the Constitution. *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995). I here condense the first two of Epstein's rules into respect for persons and property, and set aside the necessity defense as one of the common law's rarely invoked, albeit occasionally useful, subtleties.

[46] *See* RANDY A. BARNETT, THE STRUCTURE OF LIBERTY 124-127 (Oxford Univ. Press 1998) (describing how the "electorate of law" shapes the common law).

works private. He might release authorized copies only upon mutually agreed terms, enforceable under contract law. An author, or more likely an author's publisher, might publish copies only subject to built-in technical defenses, ones that common law can help to nurture by keeping labs under lock and research confidential.[47] Even though the common law does not protect an author's expression *per se*, it protects physical copies of an author's work and the author's person. Even absent copyright, then, authors can profit from selling such things as originals, signed copies, performances, and custom works. Authors can also benefit from the right, bestowed by common law on each of us, to transfer what we own on whomsoever we please. The common law thus respects productive labor and honest begging, alike.

Those and other, as yet undiscovered, arrangements of common law rights could do a great deal to stimulate the creation and distribution of works of authorship. Whether the common law could thereby match copyright's effort to "promote the general Welfare"[48] and "the Progress of Science and useful Arts" remains for now undecided.[49] To help unravel that mystery, we should encourage authors and copyright holders to experiment with common law alternatives to copyright. If copyright were thereby to become an unnecessary stimulus to authorship, it would likewise become an improper one. Common law alone would then better serve the common good.

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[47] Unlike statutory law, however, the common law does not offer *sui generis* protection to anti-circumvention technologies; hence the perceived need for the Title I of the Digital Millenium Copyright Act, 17 U.S.C. §§ 1201-ff.
[48] U.S. CONST., PREAMBLE.
[49] U.S. CONST., ART I, cl. 8, § 8.